Indian Claims Commission

Homalco Indian Band

Report on: Aupe *Indian Reserves* No. 6 *& 6A Inquiry*

DECEMBER 1995

Indian Claims Commission

Commission des revendications des Indiens

December 14, 1995

Chief and Council
Homalco Indian Band

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Homalco Indian Band
Aupe Indian Reserve 6 and 6A Inquiry

The Homalco Indian Band initiated proceedings before this Commission by letter dated May 6, 1994, from Chief Richard Harry of the Homalco Indian Band, to the Commissioners of the Indian Claims Commission. On July 6, 1994, the Commission advised the Government of Canada and the Chief and Council of the Homalco Indian Band that it would conduct an inquiry into the Government's rejection of the specific claim of this First Nation.

This inquiry deals with the circumstances surrounding the creation of Aupe Indian Reserves 6 and 6A, between 1888 and 1924. The Commission has reviewed over 2000 pages of documents related to this inquiry. In addition to this review, the Commission visited the reserves in question on April 18, 1995. On June 9,1995, the Commissioners heard oral submissions from counsel for the parties on the legal issues raised in this inquiry.

As set out in Recommendation 3 in the Commission's Annual Report for 1994/95, we will be arranging for a meeting of the parties to respond to this Report within 90 days of the date of this letter. The government response should contain detailed reasons for the acceptance or rejection of our recommendation and include a precis of any fresh legal opinion received from the Department of Justice.

CANADA

Éd. Enterprise Building, Suite 400 - 427 ouest, av. Laurier Ave West
P.O. Box/C.P. 1750, Station/Succursale "B", Ottawa, Canada K1P 1A2
Tel (613) 943-2737 Fax (613) 943-0157

Our review of the history of this claim, and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde Commission Co-Chair	Carole T.Corcoran Commissioner	Aurélien Gill Commissioner

102-02873/

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE CLAIM OF THE HOMALCO INDIAN BAND

PANEL

Commission Co-Chair Daniel J. Bellegarde
Commissioner Carole T. Corcoran
Commissioner Aurélien Gill

COUNSEL

For the Homalco Indian Band
Donna L. Kydd / Steven M. Kelliher

For the Government of Canada
Bruce Becker / Sarah Kelleher

To the Indian Claims Commission
Robert F. Reid QC / Kim Fullerton
Isa Gros-Louis Ahenakew / Donna Jordan

December 1995

CONTENTS

EXECUTIVE SUMMARY v

PART I INTRODUCTION 1

PART II THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY 3

- THE MANDATE OF THE INDIAN CLAIMS COMMISSION 3
- THE SPECIFIC CLAIMS POLICY 6
  - The Issue of "Lawful Obligation" 6

PART III THE INQUIRY 9

- CLAIM AREA 9
- HISTORICAL BACKGROUND 11
  - O'Reilly Charged with Setting Out Homalco Reserves 11
  - Establishment of Aupe IR 6, 1888 13
  - Homalco's Request for 80 Acres at Aupe Denied, 1907 18
  - William and Emma Thompson Arrive at Aupe, 1908 21
  - William Thompson Applies To Pre-empt 160 Acres, 1910 23
  - Province Threatens To Cancel Pre-emption, 1911 29
  - Survey for Indian Reserve, 1912 32
  - Royal Commission Report and Death of William Thompson, 1914-15 35
  - Canada Recommends 29.7 Acres for Indian Reserve, 1916 39
  - Province Recommends 20 Acres for Indian Reserve, 1917 40
  - Reaction to 20-Acre Settlement, 1918-22 42
  - Indian Reserve 6A and Thompson Grant, 1924 44

PART IV ISSUES 47

PART V **ANALYSIS** 49

ISSUE 1 49
Sketches of IR 6 53
Green's Sketch 55
O'Reilly's Sketch 57
Other Documents 57
Actions of Indian Superintendent 60
Question of Compensation 63

ISSUE 2 65
Section 91(24) of the *Constitution Act, 1867* 67
Crown's Special Historical Relationship 68
Interpretation of Article 13 of *Terms of Union, 1871* 72

ISSUE 3 78
Pre-emption of Land 78
Specific Claims Policy and Fraud 84
Canada's Fiduciary Obligation 86
Undertaking or Agreement 89
Unilateral Discretion 93
Vulnerability 94
Breach of Fiduciary Obligation 96
Loss to the Band 97

PART VI **FINDINGS AND RECOMMENDATION** 103

APPENDICES

A The Homalco Indian Band Inquiry 105

B Statement of Issues Suggested by Counsel for Canada and the Homalco Indian Band 106

EXECUTIVE SUMMARY

BACKGROUND

In the summer of 1888, Reserve Commissioner Peter O'Reilly and Surveyor Ashdown Green consulted with the Chief and most members of the Homalco Indian Band regarding the lands the Homalco wished to have allotted as reserves around Bute Inlet (on the coast of British Columbia north of Powell River and opposite Campbell River on Vancouver Island). O'Reilly allotted six parcels of land which were enumerated in Minutes of Decision on August 10, giving an acreage and a metes-and-bounds description for each. One of these parcels of land was Aupe Indian Reserve (IR) 6. O'Reilly and Green prepared separate field sketches for this reserve; a notation on O'Reilly's sketch described it as 25 acres. This reference to 25 acres echoed the Minute of Decision for Aupe IR 6 which also described the reserve as 25 acres. The following day the Minute of Decision and O'Reilly's sketch were forwarded to a surveyor, E.M. Skinner, who used them in November of that year as instructions for his survey of the reserve. The resulting plan accords with the metes-and-bounds description in the Minute of Decision, but differs markedly from the acreage description in the Minute of Decision and from O'Reilly's field sketch as well as Green's, with the result that only 14 acres were ascribed to Aupe IR 6.

Despite this discrepancy in amount of land, the allotment was approved by both Commissioner O'Reilly and provincial authorities with no indication that the acreage figures were considered problematic. This approval was also given in spite of a letter of warning about Skinner's qualifications from the President of the Association of Dominion Land Surveyors, which was sent to the Superintendent General of Indian Affairs in March 1889, two years before British Columbia approved the reserve and 13 years before it was listed in Canada's Schedule of Indian Reserves.

The first part of the Homalco Indian Band's specific claim arises out of these circumstances. The Band alleges that Aupe IR 6 was to comprise 25 acres as indicated in the acreage description in Commissioner O'Reilly's Minute of Decision.

The second part of this claim relates to a request the Band made in September 1907 for an additional 80 acres of reserve land. The request was for a specific parcel of land adjoining Aupe IR 6 which was more suitable than the reserve for agriculture and which also contained the Band's graveyard. The request was forwarded by Indian Agent R.C. McDonald to Indian Superintendent A.W. Vowell on November 16, but McDonald wrote back to the Band with news of a denial in a little over a week: "the Indian Department is not in a position to make further allotments of land for Indian purposes, and . . . your request cannot therefore be favorably considered." It is unclear from the evidence whether Vowell ever took action on the Band's behalf other than to deny summarily the request.

The third part of this claim relates to the pre-emption claim of the Band's schoolteacher. In 1908 William and Emma Thompson arrived at Aupe to operate the Band's day school. The Band had built a schoolhouse at considerable expense, believing that it was within the boundaries of Aupe IR 6. Shortly after the Thompsons arrived, they began inquiring about pre-emption procedures. In February 1910, Thompson submitted his formal application to pre-empt 160 acres of land adjoining Aupe IR 6. In his application, he stated that the lands were unoccupied and unreserved Crown lands, not part of an Indian settlement, and not timber lands (within the meaning of the *Land Act*). He also provided a sketch on the back of his application which failed to show that the school and the Band's fenced-in graveyard were included in his request. To obtain a Crown grant, Thompson was required to live on the land for at least six months out of every year for three years; he intended to use his residence at the school to satisfy this requirement.

The Homalco immediately asked Indian Agent McDonald to stop Thompson from securing the land. Nevertheless, that spring, Thompson received his pre-emption for the 160 acres.

In the fall of 1910, the Inspector of BC Indian Schools visited Aupe and reported back to the Department of Indian Affairs that the Band's school and graveyard were included in Thompson's pre-emption claim. It was his opinion that the pre-emption would not have been recorded if the Commissioner of Lands had known the true facts. The Department of Indian Affairs notified provincial officials that the school and graveyard were on the pre-empted land and that Thompson was aware of that fact when he made his application. In May 1911, the Deputy Minister of Lands threatened Thompson with a cancellation of his pre-emption, or at least the exclusion of the school and graveyard lands, and demanded an explanation for Thompson's misleading statements that these were not Indian settlement lands. In response, Thompson denied any deliberate wrongdoing and suggested that he had not intended to interfere with the school and graveyard, assuming that the government would settle the matter after the land had been surveyed. He pointed out that the Indians had earlier been refused this same land, and suggested that they nevertheless had built the school, "knowing they were off the reserve." Meanwhile, the Deputy Minister assured the Chief of the Homalco Band that Thompson would not acquire title to the school and graveyard lands and he forwarded a sketch to the Chief, indicating the lands which, subject to survey, he proposed to exclude from the pre-emption. When Thompson saw the sketch, he protested that he would lose

40 acres of "the best of the land, including the whole waterfront, and the land on which I have built my house."

Tensions continued to mount. Band members withdrew their children from the school, seized school supplies, threatened Thompson, and interfered with an attempted survey. Finally, in February 1912, a survey was successfully completed by surveyor Henry Rhodes shortly before Thompson's employment as teacher was terminated that spring. Thompson was asked to return his pre-emption record so that an amendment excluding the surveyed land (measuring 10 by 30 chains) could be made. He steadfastly refused to comply with this request.

In September 1912, the McKenna-McBride Royal Commission was established to adjust the acreage of Indian reserves in British Columbia. The Royal Commission visited Church House and heard submissions from the Homalco and Thompson. Interim Report No. 84, issued by the Commission on August 12, 1915, resolved that a 29.7-acre parcel of land be constituted a reserve for the Homalco Band.

In February 1916, the federal government forwarded Order in Council 388 to the Premier of British Columbia; it recommended adoption of the McKenna-McBride Commission's ruling. The province, however, never issued a concurrent Order in Council. Emma Thompson, who had inherited her husband's pre-emption rights in 1915, continued to hold out for a greater amount of land. After further investigations, the province proposed a final settlement of 20 acres. Mrs. Thompson suggested a still smaller exclusion from her pre-emption, but, eventually, when the province refused to reopen the matter, she relented, and on November 29, 1922, her full payment for 145 acres was recorded. She received title to the land on October 1, 1924. With the passing of the Province's Order in Council 911 on July 26, 1923, and Canada's Order in Council 1265 on July 21, 1924, the 20-acre exclusion and the small 0.08-acre graveyard became Aupe Indian Reserve 6A.

ISSUES BEFORE THE COMMISSION

1 Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

2 Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

3 Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

CONCLUSIONS

Issue 1

Neither the acreage description in the Minute of Decision, as a pre-survey estimate, nor the metes-and-bounds description, as a technical method foreign to the members of the Homalco Band, offers a definitive description of the intentions of the parties as to the extent of the reserve. Therefore, it is doubtful that both parties could have intended *either* type of description to be the sole identification of the boundaries. Further, the Minute of Decision itself was not a stand-alone document; there were also sketches and notes produced to assist in recording the two parties' intentions. The sketches of O'Reilly and Green, however, differ both from each other and from the survey plan. Given the inconclusive nature of all of this evidence as to the intentions of the parties, it is necessary to refer to other documents made in conjunction with the sketches.

Green's notes and O'Reilly's report to the Superintendent General of Indian Affairs refer to the inclusion of 10 small houses and timber for fuel. Therefore, it is clear that the intentions of the parties were to set apart enough land for houses and for firewood. The purpose of both the acreage and the metes-and-bounds descriptions was to ensure that the physical features pointed out by the Chief and the Homalco people were included in the reserve. In the end it did not matter whether the reserve was of 25 acres or as described by metes and bounds; what counted was that the land the parties agreed to was included in the final survey. From the Band's subsequent actions, it intended the reserve boundaries to encompass at least the area of the future schoolhouse, since Band members apparently believed this actually to be the case. It is worth noting that O'Reilly's sketch and Green's sketch, although dissimilar in many ways, both have the north/south easterly boundary well back of the mouth of the creek. It is also worth noting that they were both present at the time of the agreement with Chief Timothy and the Homalco. Before Commissioner O'Reilly approved the survey of the reserve, he should have compared Mr. Skinner's survey with his notes and Mr. Green's sketch. Had he done so, he would have noticed the discrepancy. This ought to have resulted in a fresh survey that would have put the future schoolhouse within the boundaries of the reserve.

Although on the evidence before us it is not possible to determine conclusively the intentions of both the Band and O'Reilly with respect to the reserve boundaries, in our opinion a more professional handling of this affair would have involved the submission of the acreage discrepancy to some process of investigation and resolution. There is no evidence on the record before us that the discrepancy was the subject of any discussion at any point during the allocation and subsequent confirmation process. In addition, there is no evidence that the Indian Superintendent ever confirmed O'Reilly's actions in relation to Aupe IR 6. We find that, in the particular circumstances of this claim, the Indian Superintendent's failure to fulfil his supervisory obligation as set out in the Order in Council appointing O'Reilly constituted "a breach of an obligation arising out of [a statute] pertaining to Indians [or] the regulations thereunder" within the meaning of Canada's Specific Claims Policy.

We are still left, however, with the question of compensation or damages. Even assuming that all parties intended to allot the full 25 acres of land for Aupe IR 6 (and we have made no such finding), the missing 11 acres were in any event contained within the 20.08 acres allotted to the Band in 1923-24 as Aupe IR 6A. Furthermore, compensation for loss of use is not readily apparent in this case, as the Band used the area in dispute for a schoolhouse, graveyards, and other improvements.

We do, however, see one way in which the Band suffered a loss as a result of the Indian Superintendent's failure to review the actions of Commissioner O'Reilly. If he had examined all the documents and had discovered that Mr. Skinner's survey plan did not reflect the true intentions of the Band and Commissioner O'Reilly, he ought to have taken action to adjust the survey plan. A properly adjusted survey plan would have placed the Band's future schoolhouse within the boundaries of Aupe IR 6. In such circumstances, Mr. Thompson would not have been able to use the school to satisfy his pre-emption residency requirements. The loss to the Band resulting from this pre-emption will be discussed in greater detail under Issue 3.

Issue 2

We do not find that Canada had a legal obligation under section 91(24) of the *Constitution Act, 1867*, to acquire 80 additional acres of reserve land when Band members requested the land in 1907, nor, under the particular circumstances at that time, was Canada under a fiduciary obligation to do so. In addition, on the basis of the little information available to us at this point, and the uncertainty surrounding its meaning, we cannot conclude that an obligation to provide the Band with this land arose under Article 13 of the British Columbia *Terms of Union, 1871*. We wish to emphasize, however, that we are only speaking here of duties which fall within the ambit of the Specific Claims Policy and not of duties which may or may not arise from the existence of aboriginal rights or title and which may be pursued through other avenues of redress.

Issue 3

The facts surrounding the Thompsons and their pre-emption application are very disturbing. In our opinion, the false declarations made by Mr. Thompson in his application constitute fraud. Specifically, he falsely declared that:

i) the lands were being taken up for agricultural purposes, and could not be classified as timber lands within the meaning of the *Land Act*; and

ii) the lands were unoccupied and not part of an Indian settlement.

Under the Specific Claims Policy, Canada is prepared to acknowledge claims based on "[f]raud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated." Mr. Thompson was an employee of the federal government, and his fraudulent misrepresentation was in connection with the acquisition of Indian land. It is true that the land was Indian settlement land and not reserve land. However, to exclude this aspect of the claim on this basis would work at opposite purposes to the policy as a whole, which is meant to address the settlement of legitimate, long-standing grievances. Further, the specific circumstances enumerated in the policy under which Canada will acknowledge claims are examples and not considered exhaustive. Similar to treaties, the policy should be given a fair and liberal construction in favour of the Indians and it should be construed not according to the technical meaning of its words, but in the sense in which it would naturally be understood by the Indians.

In the alternative, we have also considered the Band's argument that Canada breached its fiduciary obligation to the Band in relation to Mr. Thompson's pre-emption. In our view, Canada had a duty to protect the Band's Indian settlement lands. It breached that duty by failing to dismiss Thompson at an early date, thus preventing him from using the school to fulfil his pre-emption duties. In our opinion, if the Thompsons had been prevented from pursuing their pre-emption claim and from interfering ceaselessly with the Band's attempts to protect its settlement lands, the Homalco would have received 29.7 acres as recommended by the McKenna-McBride Royal Commission. Given that they received 20.08 acres in 1924, then the loss to the Band is 9.62 acres.

FINDINGS AND RECOMMENDATION

Under the mandate of this Commission, we can make or withhold a recommendation that a claim referred to us should be accepted for negotiation pursuant to the Specific

Claims Policy. Having full regard to that policy, and having found that this claim discloses

- in Issue 1, a breach of an obligation arising out of the Order in Council appointing Commissioner O'Reilly;
- in Issue 3, fraud by an employee of the Department of Indian Affairs;
- in the alternative in Issue 3, a breach of Canada's fiduciary obligation to the Band;

and, having found that as a result the loss to the Band is 9.62 acres, we therefore recommend to the parties:

> **That the claim of the Homalco Indian Band with respect to Aupe IR 6 and Aupe IR 6A be accepted for negotiation under Canada's Specific Claims Policy.**

PART I

INTRODUCTION

On July 6, 1994, the Indian Claims Commission (ICC) agreed to conduct this inquiry into the specific claim of the Homalco Indian Band. This claim relates to lands allotted to the Band at Aupe Indian Reserve (IR) 6 and the adjoining reserve Aupe IR 6A. The Band claims that, for various reasons, the land set apart at both reserves was insufficient and inadequate.

When the boundaries of Aupe IR 6 were first considered in August 1888, the Indian Reserve Commissioner's Minute of Decision described "Aup" as being 25 acres. The subsequent survey, however, produced a reserve of only 14 acres. The 11-acre discrepancy between the acreage description in the Minute of Decision and the present size of Aupe IR 6 is one aspect of this claim.

In 1907 the Band requested an additional 80 acres of reserve land adjoining Aupe IR 6. The Band's request was denied but shortly thereafter the Band's teacher, William Thompson, applied for a pre-emption involving the same land. Over the protests of the Band and despite Canada's representations to the province of British Columbia on the Band's behalf, the Thompson family succeeded in acquiring 145 acres in the area by 1924. Around the same time, Aupe IR 6A was set aside adjacent to Aupe IR 6, but it only encompassed 20.08 acres.

In July 1992 the Band submitted a specific claim to the Department of Indian Affairs and Northern Development (DIAND) in relation to Aupe IR 6 and Aupe IR 6A. Canada rejected the claim on March 15, 1994. The Band's subsequent efforts to obtain the details of the legal opinion upon which Canada relied were unsuccessful. As a result, the Band requested that this Commission inquire into the rejection of its claim.

This Commission was established in 1991 to assist First Nations and Canada in the negotiation and fair resolution of specific claims. One aspect of our mandate is to inquire into and report on specific claims that have been rejected by Canada. Thus, our task here is to examine the claim of the Band and assess its validity on the basis of Canada's Specific Claims Policy.

This report sets out our findings and recommendation to the Band and to Canada. The structure of the report is as follows: Part II relates to the mandate of the Commission; Part III summarizes the inquiry and the historical background; Part IV sets out the issues; Part V contains our analysis of the facts and the law; and Part VI states our recommendation.

PART II

THE COMMISSION MANDATE AND SPECIFIC CLAIMS POLICY

THE MANDATE OF THE INDIAN CLAIMS COMMISSION

The mandate of this Commission to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued under the Great Seal to the Commissioners on September 1, 1992. It directs:

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination on the applicable criteria.[1]

This is an inquiry into a claim that has been rejected. A brief synopsis of how it came before this Commission follows.

On July 6, 1992, Donna L. Kydd, counsel for the Homalco Indian Band, filed a Specific Claim Submission entitled "Aupe Indian Reserve #6 and Aupe Indian Reserve #6A" with the Specific Claims West Branch of the Department of Indian Affairs and Northern Development (DIAND).[2] By letter dated July 30, 1993, Dr.

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[1] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991.

[2] Donna L. Kydd to Department of Indian Affairs and Northern Development, Specific Claims West, July 6, 1992 (ICC file 2109-14-1; ICC Documents, pp. 535-659).

John L. Hall, Research Manager - BC and Yukon, Specific Claims West, informed Chief Richard Harry of the Homalco Indian Band that, as a result of its preliminary legal review, the branch was of the view that there was no outstanding lawful obligation on the part of the Government of Canada with regard to the Band's claim. Accordingly Specific Claims West was not prepared to recommend that the claim be accepted for negotiation. However, Dr. Hall stated that this was a preliminary legal opinion only and he invited the Homalco Band and its legal counsel to submit further information before a final recommendation was made to the Minister. Dr. Hall also advised that, although he was not permitted to give out the legal opinion itself, he and Sarah Kelleher from the Department of Justice were available to discuss in more detail the basis of this preliminary legal opinion.[3]

On September 24, 1993, Dr. Hall, at the request of Chief Harry,[4] provided a brief outline of the reasons behind Specific Claims West's recommendation that the Aupe claim be rejected. Dr. Hall reiterated that this was a preliminary position and that their legal advisors would consider further information submitted by the Band and its legal counsel.[5] Chief Harry, on behalf of the Homalco Indian Band Council, responded to Dr. Hall's letter of September 24, 1993, advising that the reasons provided in the letter did not provide the Band with "enough information to make a proper, sound or reasoned response."[6] He also requested that more comprehensive reasons or the preliminary justice opinion be provided.

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[3] Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Chief Richard Harry, July 30, 1993 (ICC Documents, p. 813).

[4] Chief Richard Harry to Dr. John L. Hall, Specific Claims West, DIAND, August 27, 1993 (ICC Documents, p. 814).

[5] Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Chief Richard Harry, September 24, 1993 (ICC Documents, pp. 815-17).

Following a meeting between Donna Kydd and Sarah Kelleher, Dr. Hall wrote to Ms Kydd on March 15, 1994, informing her that the additional points and arguments she raised did not indicate any outstanding lawful obligation on the part of the Government of Canada to the Homalco Band. He suggested that the options open to the Band included a submission to this Commission.[7]

On May 6, 1994, Chief Harry wrote to the Commissioners of the Indian Claims Commission stating that the Band could not prepare an informed, well-reasoned response without the particulars of the Department of Justice's legal opinion: "As a result of this apparent impasse, we wish to place our Claim before the Indian Claims Commission . . . for review and inquiry."[8]

On July 6, 1994, Daniel Bellegarde and James Prentice, Co-Chairs of the Indian Claims Commission, wrote to the Chief and Council of the Homalco Indian Band, the Honourable Ron Irwin, Minister of Indian and Northern Affairs, and the Honourable Allan Rock, Minister of Justice and Attorney General, advising that the Commissioners had agreed to conduct an inquiry into this rejected claim.[9]

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[6] Chief Richard Harry to Dr. John L. Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, October 8, 1993 (ICC Documents, p. 820-21).

[7] John Hall, Research Manager - BC and Yukon, Specific Claims West, DIAND, to Donna Kydd, March 15, 1994 (ICC Documents, pp. 822-24).

[8] Chief Richard Harry to the Commissioners, Indian Claims Commission, May 6, 1994 (ICC file 2109-14-1).

[9] Dan Bellegarde and James Prentice, Co-Chairs, to Chief and Council, Homalco Indian Band, and to the Ministers of Indian and Northern Affairs and Justice, July 6, 1994 (ICC file 2109-14-1).

Under its mandate, the purpose of the Commission in conducting this inquiry is to inquire into and report on whether, on the basis of Canada's Specific Claims Policy, the Homalco Indian Band has a valid claim for negotiation.

THE SPECIFIC CLAIMS POLICY

The Indian Claims Commission is directed to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by the Department of Indian Affairs entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[10] Unless expressly stated otherwise, references to the Policy in this report are to *Outstanding Business*.

The Issue of "Lawful Obligation"

Although the Commission is directed to look at the entire Policy in its review of rejected claims, the focal point of its inquiry, in the context of this claim, is found in the following passage:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.

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[10] Department of Indian Affairs and Northern Development (DIAND), *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982) [hereinafter cited as *Outstanding Business*].

> ii) A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.
> iii) A breach of an obligation arising out of government administration of Indian funds or other assets.
> iv) An illegal disposition of Indian land.
>
> . . .
>
> In addition to the foregoing, the government is prepared to acknowledge claims which are based on the following circumstances:
>
> i) Failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority.
> ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[11]

In our view, the list of examples enumerated under the policy is not intended to be exhaustive. For example, we have found in past reports that a lawful obligation may arise from a breach of fiduciary duty.

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[11] *Outstanding Business*, 20.

PART III

THE INQUIRY

In this section of the report, we examine the historical evidence relevant to the claim of the Homalco Indian Band. Our investigation into this claim included the review of several volumes of documentary material submitted by the parties, two expert reports by Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada,[12] one expert report by Gordon B. Gamble, Canada and British Columbia Land Surveyor,[13] various maps, and other exhibits. In addition, the Commission had the privilege of visiting Aupe on April 18, 1995, to view the lands at issue in this inquiry. Cross-examination of Mr. Gamble and oral submissions from legal counsel were heard on June 9, 1995, in Vancouver, British Columbia. An outline of the record for this inquiry is found in Appendix A.

CLAIM AREA

The traditional territory of the Homalco Indian Band surrounds Bute Inlet on the British Columbia coast north of Powell River and opposite Vancouver Island's Campbell River.[14] Today, the Homalco Indian Band has 12 reserves at nine locations (see map of claim area on page 10). Except for the newest reserve at Campbell River, the rest are around Bute Inlet. None of the Band's reserves were created

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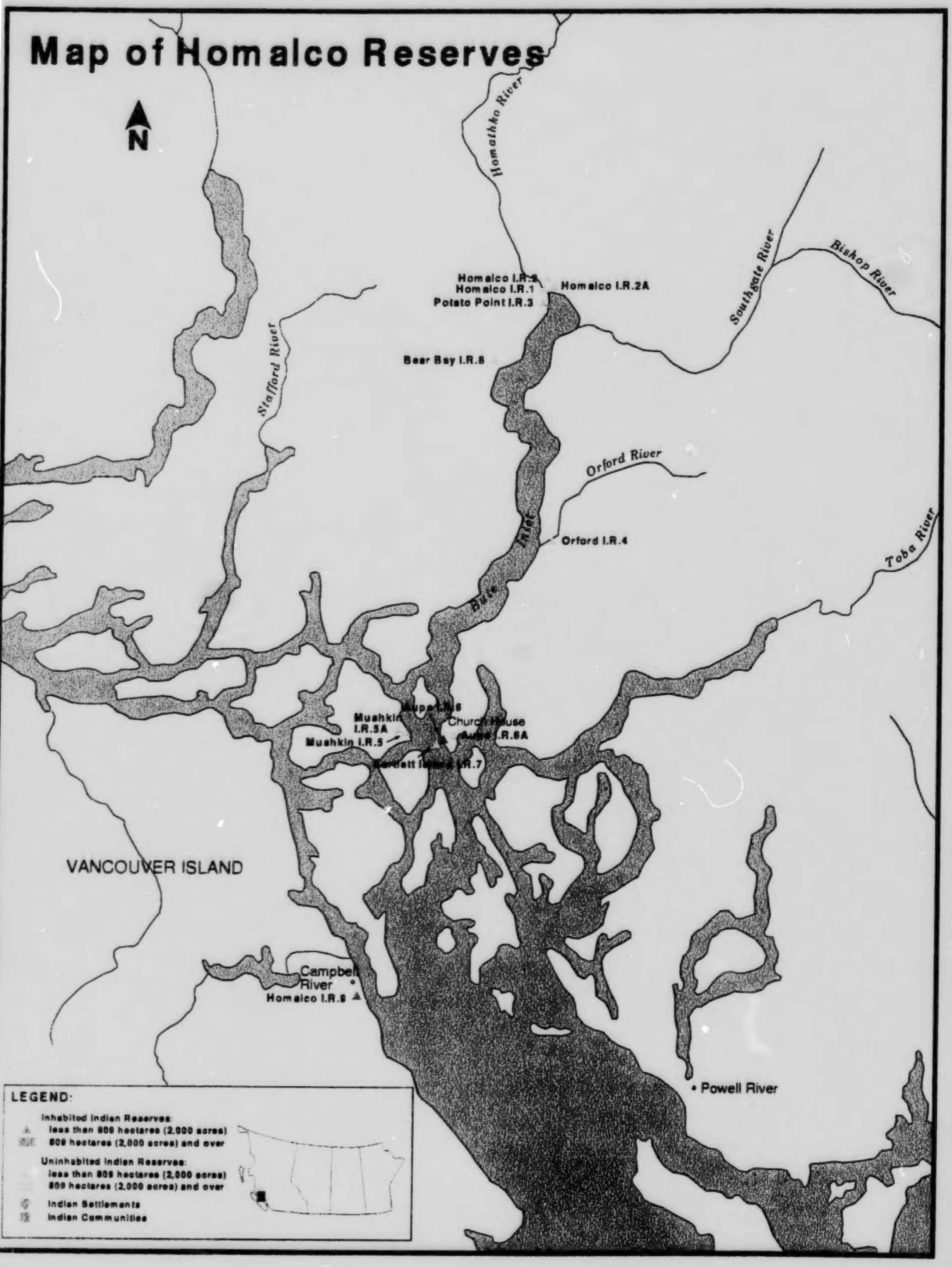
[12] Both reports take the form of letters to Sarah Kelleher, Counsel for Specific Claims West, DIAND, the first dated December 6, 1994 (ICC Exhibit 2), the second dated April 11, 1995 (ICC Exhibit 3).

[13] Gordon B. Gamble, "Report on Acreage Discrepancy: Aupe Indian Reserve No. 6," June 1, 1995 (ICC Exhibit 4).

[14] Dorothy Kennedy and Randy Bouchard, *Sliammon Life, Sliammon Lands* (Vancouver: Talon Books, 1983), 14 (ICC Documents, p. 515).

Map of Homalco Reserves


N
Homathko River
Southgate River
Bishop River
Stafford River
Orford River
Toba River
Bute Inlet
Homalco I.R.2
Homalco I.R.1
Homalco I.R.2A
Potato Point I.R.3
Bear Bay I.R.8
Orford I.R.4
Mupa I.R.6
Mushkin I.R.5A
Church House
Mushkin I.R.5
Aupe I.R.6A
Burdett Island I.R.7
VANCOUVER ISLAND
Campbell River
Homalco I.R.9
Powell River
LEGEND:
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Uninhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Indian Settlements
Indian Communities

under treaty. Aupe IR 6 and adjoining Aupe IR 6A together comprise a 34.08-acre area of reserve land at the mouth of Bute Inlet. Both centre on the community of Church House, but they were established decades apart in time and under different circumstances. This claim relates to the circumstances of their creation.

HISTORICAL BACKGROUND

O'Reilly Charged with Setting Out Homalco Reserves

In July 1880 Peter O'Reilly replaced G.M. Sproat as Indian Reserve Commissioner for the Province of British Columbia. He was charged with:

> ascertaining accurately the requirements of the Indian Bands . . . to whom lands have not been assigned by the late Commission, and allotting suitable lands to them for tillage and grazing purposes.[15]

Unlike Commissioner Sproat, Commissioner O'Reilly was not placed under the direction of Canada's Indian Superintendent for British Columbia. However, it is clear that his actions were subject to confirmation by officials from both the provincial and federal governments:

> the Reserve Commissioner instead of being placed, as at present, under the direction of the Indian Superintendent for British Columbia, should act on his own discretion, in furtherance of the joint suggestions of the Chief Commissioner of Lands & Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established; and that the action of the Reserve Commissioner should in all cases be subject to confirmation by those officers; and that,

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[15] Order in Council, July 19, 1880 (ICC Documents, pp. 21-23).

> failing their agreement, any and every question at issue between them should be referred for settlement to the Lieutenant Governor, whose decision should be final and binding.[16]

In a letter dated August 9, 1880, the Department of Indian Affairs sent Commissioner O'Reilly the following further instructions:

> . . . In allotting Reserve lands to each Band you should be guided generally by the spirit of the terms of Union between the Dominion and local Governments which contemplated a "liberal policy" being pursued towards the Indians. You should have special regard to the habits wants and pursuits of the Band, to the amount of territory in the Country frequented by it, as well as to the claims of the White settlers (if any).
>
> You should assure the Indians of the anxious desire of the Government to deal justly and liberally with them in the settlement of their Reserves as well as in all other matters; informing them also that the aim and object of the Government is to assist them to raise themselves in the social and moral scale so as ultimately to enjoy all the privileges and advantages enjoyed by their White fellow subjects.
>
> With regard to the views of the Govt. on the land question, I have the honor to refer you to the documents in relation to this matter printed with the Annual Report of the Dept. of the Interior for 1875; and I have the honor to request that you will act in the spirit thereof.
>
> The Government consider it of paramount importance that in the settlement of the land question nothing should be done to militate against the maintenance of friendly relations between the Government and the Indians, you should therefore interfere as little as possible with any tribal arrangements being specially careful not to disturb the Indians in the possession of any villages, fur trading posts, settlements, clearings, burial places, and fishing stations occupied by them and to which they may be specially attached. . . . You should in making allotments of lands for Reserves make no attempt to cause any violent,

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[16] Ibid.

> or sudden change in the habits of the Indian Band for which you may be setting apart the Reserve land; or to divert the Indians from any legitimate pursuits or occupations which they may be profitably following or engaged in; you should on the contrary encourage them in any branch of industry in which you find them so engaged.[17]

Commissioner O'Reilly was also directed to make "ample provision of water" for the Indians.[18]

Establishment of Aupe IR 6, 1888

In carrying out his instructions, Commissioner O'Reilly, accompanied by Surveyor Ashdown Green, journeyed to Bute Inlet in August 1888 and met with Chief Timothy and most of the Homalco tribe. The Homalco pointed out to Commissioner O'Reilly the lands they wished to have reserved.[19] Mr. Green prepared a sketch of Aupe IR 6 with brief notes dated August 9, 1888.[20]

On August 10, 1888, Commissioner O'Reilly wrote Minutes of Decision to reserve six parcels of land for the Homalco; these parcels became Homalco IR 1, Homalco IR 2, Potato Point IR 3, Orford Bay IR 4, Mushkin IR 5, and Aupe IR 6. The Minute of Decision for Aupe reads:

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[17] Copy of letter from Indian Affairs, Ottawa, to P. O'Reilly, August 9, 1880, National Archives of Canada [hereinafter NA], RG 10, vol. 3716, file 22195 (ICC Documents, pp. 24-28).

[18] Ibid.

[19] P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

[20] Canada Land Survey Records [hereinafter CLSR], Field Book BC 457, in Gordon B. Gamble, "Report on Acreage Discrepancy," note 13 above, tab 5.

> No. 6 Aup [sic], a reserve of twenty-five (25) acres, situated on the Eastern shore of Bute Inlet, near Bartlett Island.
>
> Commencing at a Fir marked Indian Reserve, and running North twenty (20) chains; thence West to the seashore, and thence following the coast in a Southerly direction to the point of commencement.[21]

Attached to the Minutes of Decision is a thumbnail sketch of Aupe IR 6, describing it as 25 acres.

By letter dated August 11, 1888, Commissioner O'Reilly sent the Minutes and "rough sketches" to surveyor E.M. Skinner for "information and guidance." He advised that "[t]he sketches indicate the lands intended to be given to the different tribes," and he thought that Skinner would "have no difficulty in carrying out" the surveys. While he offered further thoughts on Orford Bay and Potato Point, for Aupe IR 6 the Minute of Decision and the accompanying sketch for "25 acres" were the extent of O'Reilly's instructions to Skinner.[22]

Mr. Skinner surveyed Aupe IR 6 on November 1 and 2, 1888, but he did not finish surveying the rest of the Homalco's reserves until May 1889.[23] In the meantime, Commissioner O'Reilly forwarded a report, Minutes of Decision, and sketches for 21 reserves in the New Westminster Agency to the Superintendent General of Indian Affairs. His report, dated December 8, 1888, explains that he had met Chief Timothy and most of the Indians of the Homalco tribe (population 74) on August 10, 1888:

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[21] P. O'Reilly, Minutes of Decision, DIAND, Reserves and Trusts, book 23, pp. 19-21 (ICC Documents, pp. 29-31).

[22] P. O'Reilly to E.M. Skinner, August 11, 1888, NA, RG 10, vol. 1277 (ICC Documents, pp. 32-33).

[23] Gordon B. Gamble, "Report on Acreage Discrepancy," note 13 above, p. 6 (ICC Exhibit 4); and E.M. Skinner to P. O'Reilly, May 8, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 835).

> They were much pleased at the prospect of having their reserves defined and took great interest in pointing out the several places they wished to have secured for their use. With their assistance I made the following reserves viz
> No. 1 Homalco . . . at the head of Bute Inlet. . . . This is the only reserve, and I believe the only place in the district where agriculture can be carried on extensively with any prospect of success. . . .
> . . .
> No. 6 Aup, a well sheltered spot at the entrance to Bute Inlet, near Bartlett Island, upon which ten small houses stand. There is plenty of timber for fuel, in other respects it is valueless. This reserve contains 25 acres.
>
> The few white men resident in this district speak highly of the Sliammon, Klahoose, and Homalco tribes. They are industrious, and find employment readily in the logging camps, and also in the canneries on the Fraser River. Their fisheries and hunting grounds are of great value to them. This district is however very barren, and there is no possibility of procuring agricultural land except the small quantity at Homalco [No. 1] previously referred to. Otherwise I had no difficulty in assigning the several reserves set apart for these tribes. The Indians expressed themselves highly satisfied with the allotments made for their use, and the prospect of the reserves being speedily surveyed.[24]

Commissioner O'Reilly also wrote to F.G. Vernon, Chief Commissioner of Lands and Works, on December 13, 1888, and January 2 and 10, 1889, enclosing sketches and Minutes of Decision respecting lands reserved and allotted by him for the use of the Sliammon, Klahoose, and Homalco tribes. By January 16, 1889, Chief

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[24] P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

Commissioner Vernon had given provincial approval for the allotments pertaining to these three tribes.[25]

While Mr. Skinner was still completing his survey plan, the President of the Association of Dominion Land Surveyors wrote the Minister of Interior and Superintendent General of Indian Affairs to complain about W.S. Jemmet and E.M. Skinner being employed by the Department of Indian Affairs to survey reserves in British Columbia. Although they had been listed as Dominion Land Surveyors in the Department's 1888 Annual Report, Jemmet and Skinner had no standing as surveyors. They had not received any commission to practise from the Board of Examiners for Dominion Land Surveyors. Moreover, they were not otherwise authorized to practise in British Columbia or any other province. Urging the exclusive employment of duly qualified provincial land surveyors for surveying Indian reserves outside the Railway Belt in British Columbia, the President of the Association warned of the risks of relying on those with lesser qualifications:

> It is not necessary to point out the great trouble which may, and is quite likely to arise owing to faulty surveying of Indian Reserves by those who, as far as is known, are not legally or professionally qualified to make such surveys, and who have given no bonds for the due performance of their duties.[26]

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[25] F.G. Vernon, Chief Commissioner of Lands and Works, to P. O'Reilly, January 16, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 834).

[26] President, Association of Dominion Land Surveyors, to Minister of Interior and Superintendent General of Indian Affairs, March 27, 1889, in Gamble, "Report on Acreage Discrepancy," note 13 above, tab 9 (ICC Exhibit 4).

Notwithstanding this admonition, it appears that Mr. Skinner was allowed to continue his work. On May 8, 1889, he wrote to Commissioner O'Reilly informing him that he had "finished the Homalco Reserves."[27] Skinner's Field Book documents his survey of Aupe IR 6 and provides a tiny sketch at a scale of 20 acres to the inch.[28] His "Plan of Ho-mal-ko Indian Reserves," drawn in 1888-89, describes Aupe IR 6 as "14 acres."[29]

On May 26, 1890, Commissioner O'Reilly sent the reserve plans for the Homalco and eight other bands to the Chief Commissioner of Lands and Works.[30] Almost a year elapsed before Chief Commissioner Vernon approved, on April 28, 1891, Skinner's 1888-89 survey plan which showed 14 acres for Aupe IR 6. Commissioner O'Reilly and Surveyor F.C. Green, also signed Mr. Skinner's plan.[31]

On May 4, 1891, Commissioner O'Reilly acknowledged Chief Commissioner Vernon's approval of the survey for the Homalco.[32] That same day, he wrote to the Deputy Superintendent General of Indian Affairs enclosing Vernon's letter of approval.[33] If Commissioner O'Reilly forwarded the field books and tracings to the Deputy Superintendent General, the apparent discrepancy between his own Minute of Decision – setting out 25 acres for Aupe No. 6 – and Mr. Skinner's official plan – indicating only 14 acres for Aupe No. 6 – does not seem to have been noticed or questioned by anyone at Indian Affairs headquarters. Nor was reference made to it in any correspondence concerning provincial approval of the reserves.

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[27] E.M. Skinner to P. O'Reilly, May 8, 1889, NA, RG 10, vol. 11009, mfm T-3949 (ICC Documents, p. 835).

[28] CLSR, E.M. Skinner, 1888-89 Field Book BC 290 (ICC Documents, p. 47).

[29] Plan TBC 30, DIAND, Survey Records, bears the notation "Approved April 28th 1891 sigd F.G. Vernon, C.C.L.W." (ICC Documents, p. 48).

[30] O'Reilly to Vernon, May 26, 1890, British Columbia, Department of Lands, Crown Lands, box 4, 1533/90 (ICC Documents, p. 52).

[31] Vernon to O'Reilly, April 28, 1891, British Columbia Archives and Records Service [hereinafter BCARS], GR 440, vol. 36, January 28, 1891 - June 9, 1891 (ICC Documents, pp. 53-54).

[32] O'Reilly to Vernon, May 4, 1891, BC, Crown Lands, box 4, 1610/91 (ICC Documents, pp. 55-56).

In 1893, almost two years later, Commissioner O'Reilly forwarded tracings "of the original plots of Reserves finally approved" by Chief Commissioner Vernon to the Indian Superintendent for British Columbia, A.W. Vowell, "for transmission to the local Agents."[34]

Aupe IR 6 was listed as being 14 acres in Canada's published "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902." The "Remarks" column next to the Aupe No. 6 entry was blank.[35]

Homalco's Request for 80 Acres at Aupe Denied, 1907

On September 6, 1907, during Indian Agent R.C. McDonald's visit to Aupe IR 6, the Homalco there asked him for an "addition" to the reserve. McDonald's trip diary records that he "[i]nspected land adjoining Aupe Reserve, asked for by the

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[33] O'Reilly to Vankoughnet, Deputy Superintendent General for Indian Affairs, May 4, 1891, NA, RG 10, vol. 1277 (ICC Documents, pp. 57-58).

[34] O'Reilly to A.W. Vowell, March 3, 1893, NA, RG 10, vol. 1278, mfm C-13900 (ICC Documents, p. 59).

[35] Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, p. 38 (ICC Documents, pp. 61-62).

Indians for agricultural purposes."[36] Ten weeks later, on November 16, 1907, the Agent presented the request to Indian Superintendent Vowell:

> I . . . enclose herewith a plan . . . showing a piece of land, about 80 acres in extent, adjoining the Aupe Indian reserve No. 6 . . . which the Homalco Indians ask to have reserved for them.
>
> Their village is on the Aupe reserve which contains very little land suitable for cultivation, being mostly of rock formation, and they wish to acquire the 80 acres adjoining, which is much better land, so as to clear it for cultivation.
>
> Their grave-yard, as shown on the plan, is on the land applied for, and has, they informed me, been there for the past fifteen or sixteen years. The timber has already been cut from this land, which, being near their village, would be useful for them for gardens.
>
> I advised these Indians to surrender 80 acres from one of their other reserves in exchange for this piece, but they would not consent to do so.
>
> If the whole of the land applied for cannot be acquired for them, then there should, if possible, be at least a few acres reserved for them where their graveyard is situated.[37]

On November 25, 1907, Indian Agent McDonald tersely conveyed to Chief William at Church House the only official answer the Homalco were to receive in response to their request for an addition to Aupe IR 6. In its entirety, the Agent's letter read:

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[36] R.C. McDonald, Trip Diary, September 6, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 63).

[37] Agent to Vowell, November 16, 1907, New Westminster Agency Letterbook for 1907-1908, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 65). ICC does not have the 80-acre plan; but 80 acres echoed Canada's 1873 and 1874 requests to the province that there be an 80-acre standard for all reserves. In 1874 56 Coast Salish chiefs petitioned the Indian Commissioner in support of 80 acres per family. They noted that they could be reached "through Rev. Father Durieu, at New Westminster." Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990), 46-48, 53-54.

> With regard to your request to have about 80 acres of land adjoining the reserve on which your village is situated set apart as an additional reserve for the Homalco band of Indians, I beg to inform you that I am now advised by the Indian Superintendent that the Indian Department is not in a position to make further allotments of land for Indian purposes, and that your request cannot therefore be favorably considered.[38]

If Agent McDonald, Indian Superintendent Vowell, or Indian Affairs headquarters' staff were involved in any discussions or actions concerning the Homalco's request for additional land at Aupe, the Indian Claims Commission has not received documents that show the substance of these. No reply to the Agent's November 16, 1907, letter to Indian Superintendent Vowell has been found although, in 1910, Agent McDonald indicated that Vowell had replied on November 21.[39] The Indian Claims Commission has nothing which conclusively confirms that Indian Superintendent Vowell submitted the request to Indian Affairs headquarters or representatives of the province.[40] Agent McDonald's November 16, 1907, letter to the Indian Superintendent therefore remains the only indicator of action on the

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[38] R.C. McDonald to Chief William, November 25, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 66).

[39] R.C. McDonald to Secretary, Indian Affairs, November 30, 1910, NA, RG 10 vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

[40] In 1910 McDonald enclosed the November 21, 1907, reply from Vowell (No. 409 G5) in a letter to headquarters (McDonald to Secretary, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 [ICC Documents, pp. 140-41]), but ICC does not have a copy of the reply from Vowell.

Homalco's behalf. His November 25, 1907, letter to the Chief stands as the only evidence of Indian Affairs' rejection of the request.

William and Emma Thompson Arrive at Aupe, 1908

Late in 1907 Chief William sent his people's petition for a teacher directly to the Department of Indian Affairs. Indian Agent McDonald reported back to the Department on the matter as follows:

> [T]hese Indians have, for several years, been anxious to have a school established on their reserve. They have about 30 children of school age, none of whom have as yet attended any school. I have on several occasions, requested them to send some of their children to the Sechelt school, and others to the Squamish Mission school . . . but they did not wish to send their children away from home; and, as they would not consent to send their children to any of the schools already established in the Agency; I advised them that they should join with the Klahoose and Sliammon Indians, who are also anxious for schools, and erect a building on some reserve conveniently situated for the three bands, but they would not consent to this proposal either, as they wanted a school on their own reserve. I may add that the Rev. Father Chirouse, Missionary to these Indians, advised them in this matter along the same lines as myself.
>
> About a year ago, without consulting anyone, they commenced the erection of a school building on their Aupe reserve, where their village is situated. When I visited them in the month of September last, the building was then not quite completed and there were no furnishings in it. . . .
>
> . . . [T]hey would like to have a teacher holding a public school certificate, a man with wife and family preferred, but, as their school is in a very isolated locality, there being no white settlers within twenty miles of the village, and passing steamers calling there only once a week, I fear it will hardly be possible to secure the services of a public school teacher to go to such an out of the way place, as there is a

> scarcity of such teachers even for the public schools of the province.
>
> In discussing the matter with the Rev. Father Chirouse, he informed me that he can secure the services of a gentleman (I have forgotten his name) who has had several years' experience teaching in the Indian schools of Vancouver Island, and who, with his wife, would be willing to take charge of this school, provided the remuneration were sufficient. . . .[41]

Agent McDonald endorsed the arrangement suggested by Father Chirouse and recommended it "to the favourable consideration of the Department."[42]

In May 1908 Agent McDonald wrote to Father Chirouse advising him that the Department had "sanctioned this arrangement" and asking him to communicate with "the teacher you had in view."[43] A few weeks later, Agent McDonald informed Indian Superintendent Vowell that "Mr. William Thompson has been engaged, subject to the approval of the Department, to take charge of the [Homalco Indian Day School] for a year at a salary of $600 . . ."[44]

William Thompson and his wife, Emma, were at Aupe or Church House by August 1908.[45] It quickly became apparent that Thompson had more in mind than his duties as teacher. On arrival, he questioned Agent McDonald about procedures for pre-empting land. Agent McDonald's reply suggests that, from the start, Thompson may have been hoping to avoid certain requirements connected with obtaining the right of pre-emption:

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[41] McDonald to J.D. McLean, Secretary, Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] (ICC Documents, pp. 70-72).

[42] Ibid.

[43] McDonald to Chirouse, May 15, 1908, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 78).

[44] McDonald to Vowell, June 9, 1908, NA, RG 10, vol. 1468, mfm C-14272 (ICC Documents, p. 81).

[45] McDonald to Vowell, August 7, 1908, NA, RG 10, vol. 1469 (ICC Documents, p. 83).

> The declaration in connection with the pre-emption must be made before a Commissioner or Justice of the Peace, and according to the act, there seems no way of getting around it.[46]

Within the Thompsons' first year they acquired an assistant to help with children in residence at the school, and a post office was established in the school at Church House at their request.[47]

William Thompson Applies To Pre-empt 160 Acres, 1910

On February 15, 1910, William Thompson gave official notice that he wanted the right to pre-empt 160 acres adjoining Aupe IR 6:

> I William Thompson intend to apply for a pre-emption record of 160 acres of land, bounded as follows. Commencing at this Post, thence East 40 chains; thence South 40 chains; thence West 40 chains; or to the shoreline; thence in a Northerly direction along the shore to the

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[46] McDonald to Thompson, September 25, 1908, NA, RG 10, vol. 1469, mfm C-14273 (ICC Documents, p. 85).

[47] McDonald to Vowell, March 22, 1909, NA, RG 10, vol. 1470, mfm C-14273 (ICC Documents, pp. 98-100); McDonald to Vowell, March 26, 1909, NA, RG 10, vol. 1470 (ICC Documents, p. 101); McDonald to Thompson, May 3, 1909, NA, RG 10, vol. 1470 (ICC Documents, p. 106); McDonald to Vowell, January 17, 1910 (ICC Documents, p. 109); McDonald to J.O. McLeod, Post Office, Vancouver, [October 9, 1908], NA, RG 10, vol. 1469, mfm C-14273 (ICC Documents, p. 87); McDonald to Thompson, April 7, 1909, NA, RG 10, vol. 1470, mfm C-14273 (ICC Documents, p. 103); and McDonald to J.D. McLean, April 9, 1919, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23).

> Southeast corner of the Indian Reserve thence North along the Eastern line of the Indian Reserve to the point of commencement, containing one hundred and sixty acres more or less.[48]

A formal application, with a sketch on the back, followed on February 21, 1910. The sketch of these 160 acres did not show any Indian settlements, graveyards, or improvements. His application stipulated that the lands were

> unoccupied and unreserved Crown lands (not being part of an Indian Settlement) situate in the vicinity of East side of the entrance to Bute Inlet. . . . [T]he land is not timber land within the meaning of the Act.[49]

The *Land Act* application form Thompson signed read, in part:

> My application to record is not made in trust for or on behalf of, or in collusion with any other person or persons but honestly on my own behalf for settlement and occupation for agricultural purposes and I also declare that I am duly qualified under the said Act to record the said land and I make this solemn declaration, conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act, 1893.[50]

There were immediate protests from the Homalco. Agent McDonald informed Thompson that the Indians had asked him to stop Thompson from securing the land. The Agent wrote that he had heard from Band member Billy Blainey that

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[48] Thompson, Notice of Pre-emption, February 15, 1910, NA, RG 10, vol. 11021, file 520C, mfm T3958 (ICC Documents, p. 113).

[49] Thompson, Application for Pre-emption Record, February 21, 1920, British Columbia, Department of Lands, Roll 2236 (ICC Documents, pp. 114-16).

[50] Ibid.

> you [Thompson] had purchased the land adjoining their reserve, and that, in future, when they wish to bury anybody in their graveyard, they would have to pay you $5.00 for each grave; also that you would not allow them to cut any firewood for the school on the land adjoining the reserve. . . . Billy Blainey also stated that you did not keep the school open more than two hours a day. . . .[51]

Such allegations were easily dissipated by Thompson's denial of them. Agent McDonald obsequiously wrote back to Thompson:

> It was my opinion at the time that you never made such statements to the Indians in regard to the wood and graveyard. There is no use in taking these reports seriously. . . .[52]

Nevertheless, complaints about Thompson "neglecting his work" and running a store in the school reached Ottawa.[53] Agent McDonald assured headquarters that Thompson had not been neglecting his duties. He defended Mrs. Thompson's retailing efforts as "a convenience to the Indians." The likely source of the complaint, Billy Blainey and Alex Paul, "are not classed as the best members of the band," wrote McDonald.[54]

Despite the Homalco's complaints, on April 22, 1910, the Deputy

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[51] McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118).

[52] McDonald to Thompson, March 15, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 120).

[53] McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23).

[54] McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28.)

Commissioner of Lands sent Thompson Certificate of Pre-emption Record No. 2851 for 160 acres.[55] However, the Homalco continued their efforts. On behalf of the Church House Indians, the Vancouver law firm of Dickie and DeBeck advised the province's Chief Commissioner of Lands on November 15, 1910:

> We wish to enter a protest against this preemption on the ground that it is not an unreserved, unoccupied, [illegible] Indian Settlement, within the meaning of the Act. If a hearing is to be had for the disposal of this matter, we should like some weeks notice, in order to obtain our witnesses from Church House.[56]

A few days latter the Inspector of BC Indian Schools, A.S. Green, reported on problems related to the pre-emption:

> I informed Mr. Thompson of the complaints of the Indians . . . He admitted that the Indian building and graveyard are on the land he has pre-empted . . .
>
> The school building is not more than one hundred yards from the last Indian House, at the south end of the village. About two hundred or two hundred and fifty yards further south in line with the school, is the graveyard (fenced in). I counted about fifty graves (there may be more) inside the fence, and there are some outside. About two or three hundred yards straight down from the graveyard near the beach Mr. Thompson has built a small house.

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[55] Deputy Commissioner of Lands to Thompson c/o Government Agent, Cumberland, BC, April 22, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 124). The right of pre-emption is a privilege accorded by the British Columbia government to settlers who, by virtue of their settlement and cultivation of a certain parcel of public land, gain the right to purchase that land to the exclusion of all others.

[56] Dickie & DeBeck to Chief Commissioner of Lands, November 15, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 134).

> The land where the school is built, the graveyard site, and just a few acres around have been partly cleared by the Indians, the trees cut down, and grass growing. Their few cattle graze here. Those are all included in Mr. Thompson's pre-emption claim. By living in the school building he intends to fulfil his pre-emption duties, which require him to live on the land six months in each year for three years, before getting the Crown grant.
>
> When I inspected this school on October 8, 1909, Mr. Thompson and the Indians assured me that the building was on the Reserve. I recalled this, and Mr. Thompson said that at the time of my visit he had thought so, but when he found it was not so, he recorded the land for himself.
>
> I believe, that, if the Commissioner of land at Victoria, had known, when application was made that the Indian School House and graveyard were covered by this pre-emption the recording of it would not have been permitted.
>
> I asked the Indians to take no action in the matter but to send the children to school as before. . . .
>
> I would respectfully but urgently recommend that Mr. Inspector Ditchburn, and Mr. Reserve Surveyor Green, go as soon as possible and look into this, and that the matter be brought by your Department to the notice of the B.C. Authorities.
>
> I am inclined to think that one corner of the school is on the reserve, but this is hard to tell unless surveyed.[57]

Around the same time, the Surveyor General of the province, E.B. McKay, was writing to the Deputy Commissioner that:

> The pre-emption of William Thompson is situated entirely to the east of this Indian Reserve . . . and is entirely clear of it. The sketch on the

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[57] A.S. Green to J.D. McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37).

> back of his application to pre-empt is correct and covers vacant Crown Land.[58]

For his part, Agent McDonald said he was "well aware" the graveyard was outside the reserve. Two or three years earlier he had taken the matter up with Indian Affairs through Indian Superintendent Vowell's office, but at that time the province was opposed to extending the reserve. Agent McDonald expected Mr. Thompson to "make over to the Indians that portion on which the graveyard is situate. . . ." On the other hand, he was surprised to hear the school was on the pre-emption claim.[59] As a solution Agent McDonald suggested an arrangement with the province "to exclude five or ten acres from Mr. Thompson's pre-emption."[60]

J.D. McLean, the Assistant Deputy and Secretary of the Department of Indian Affairs, wrote Deputy Commissioner Renwick on December 1, 1910, supplying reasons why the pre-emption should be cancelled:

> [T]he pre-emption . . . has been granted by your Department evidently without knowledge of the fact that an expensive schoolhouse had been built on the land and that a large Indian graveyard was also situated on it, although Mr. Thompson appears to have ascertained their positions before making his application. Under these circumstances . . . it would appear to be just that the said preemption should be cancelled and that this Department should be given the opportunity of acquiring for the

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[58] E.B. McKay to Deputy Commissioner of Lands, November 23, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 138).

[59] McDonald to Rev. A.W. Green, Inspector of Schools, November 29, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, p. 139).

[60] McDonald to Secretary, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

> Indians the land on which this school building and graveyard are situated.[61]

It is not known whether Deputy Commissioner Renwick received this letter before he rejected the Dickie and DeBeck protest as follows:

> As indicated on the application and as shown on the official plans of this Department this preemption does not encroach in any manner upon the Church House Indian Reserve, and in the opinion of this Department, the record is properly issued.[62]

Dickie and DeBeck responded that the basis of their protest was "not that the land was part of the Indian Reserve, but that it was not unoccupied land as mentioned in the Act" and that "at the time Mr. Thompson made his application, he knew every detail in connection with the occupation by the Indians."[63]

Province Threatens To Cancel Pre-emption, 1911

Early in 1911, citing an urgent petition from the Band, Indian Affairs again pressed the Lands Department to inquire into the matter.[64] The Inspector of Indian Agencies observed: "If the pre-emption can be stopped it will no doubt have the effect of pacifying the Indians. . . ."[65]

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[61] J.D. McLean to Charles Renwick, Deputy Commissioner of Lands, December 1, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 142).

[62] Renwick to Dickie & DeBeck, December 7, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 143).

[63] Dickie & DeBeck to Chief Commissioner of Lands, December 14, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 144).

[64] McLean to Renwick, January 20, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 145-46).

The provincial Deputy Minister of Lands wrote Thompson threatening to cancel the pre-emption:

> [Y]ou misled this Department and apparently have made a false declaration in so far as you have declared that the lands embraced within said record form no part of an Indian settlement and are unoccupied lands of the Crown. . . . [T]he said Record includes a school house built by the Indians of the Homalco Band at an expense of $4000.00, and also that the said record includes two Indian burial grounds. The Minister has now under consideration the cancellation of the record held by you or the amendment of the same so as to exclude the lands on which the school house stands, as well as the lands occupied as burial grounds. Before dealing with the matter finally the Minister will be pleased to have your explanation for your misleading statement . . .[66]

On the same day, the Deputy Minister also assured Chief Harry that "no person will be allowed to acquire title to the lands occupied by the School house or the Cemeteries." His letter included a tracing upon which, subject to survey, was indicated the section he proposed to have eliminated from the pre-emption.[67] Deputy Minister Renwick wrote to the Secretary, Indian Affairs, requesting that Indian Affairs complete the survey and informing him that "the Minister [of Lands] cannot recognize [the Indians'] claim to any more lands than is actually covered by the site of the school house and the graveyard."[68]

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[65] W.E. Ditchburn, Inspector of Indian Agencies, to Secretary, Indian Affairs, February 4. 1911, NA, RG 10, vol. 1312 (ICC Documents, p. 153).

[66] Deputy Minister, Lands, to Thompson, c/o Government Agent, Cumberland, BC, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 158).

[67] Deputy Minister, Lands, to George Harry, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 159-61).

Thompson responded to the Deputy Minister's demand for an explanation as follows:

> I have not knowingly made any false statement . . . the way I understand it, is, that I have taken up no land belonging to the Indians. I put my post alongside of the Indian Reserve post marked I.R. 1888 which was shown me by an Indian he also showed me the line of the Indian Reserve. In regards to the School House and graveyard (proper) I did not intend to interfere with that, but to let that matter for the Government to settle, after the land had been surveyed. I have sent you a copy of a letter from the Indian Agent to the Chief of this band, at that time, which will show you, that the Indians were refused this same land for any purpose, they afterwards built their School, knowing they were off the Reserve. The fact of the Schoolhouse and graveyard being part of an Indian settlement I did not look at it in that light. . . .[69]

He asked the Deputy Minister to "send a surveyor as soon as you can," pleading:

> In the position I am in I am not able to do anything and expect every time I go to clear a piece of land to find another grave, they have already taken about one acre more to enlarge their graveyard after knowing that I have a record for the land and I do not know what they will take next. . . .[70]

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[68] Deputy Minister, Lands, to Secretary, Indian Affairs, May 17, 1911, DIAND, Region E5673-552 (ICC Documents, p. 162).

[69] Thompson to Deputy Minister, Lands, May 25, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 163).

[70] Ibid.

On receiving Thompson's explanation, the Deputy Minister informed him that a survey was about to be made to exclude the schoolhouse and burying grounds from the pre-emption. If Thompson would not agree to this amendment "the Department will have no other course open than to cancel your record in its entirety."[71]

As soon as Thompson saw the plan Chief Harry had received from the Deputy Minister he protested to the Deputy Minister that the Indians would get 40 acres from the pre-emption which would "take in all the best of the land, including the whole waterfront, and the land on which I have built my house."[72]

Survey for Indian Reserve, 1912

The Homalco were so unhappy with their teacher and his attempts to pre-empt the land adjoining their reserve that they withdrew their children from the school, seized school supplies, threatened Thompson, and interfered with the survey attempted late in 1911.[73] Evidently, the surveyor's instructions from Indian Affairs were to survey less land than appeared to have been suggested by the Department of Lands in the tracing sent to the Chief.[74] The Homalco wanted the "whole strip of 10 x 40 chains." W.E. Ditchburn, Inspector of Indian Agencies, recommended instead that a piece of land, "10 chains wide and 30 chains deep," be surveyed. He concluded this would do "no particular injustice" to Mr. Thompson who "if he is not prepared to accept the pre-emption as finally surveyed . . . need not take it up."[75] Accordingly, Henry Rhodes, British Columbia Land Surveyor, ran survey lines for a "New Indian Reserve" in February 1912.[76]

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[71] Deputy Minister, Lands, to Thompson, June 12, 1911, BC, Lands, Roll, 2236 (ICC Documents, p. 164).

[72] Thompson to Deputy Minister, Lands, October 28, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 173).

[73] Agent Peter Byrne to A.W. Green, Inspector of Schools, November 25, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 175); Byrne to Secretary, December 12, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 180-82); Byrne to Thompson, January 4, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 184); Byrne to Secretary, January 8, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 185-86); Henry Rhodes, Field Diary, December 14, 1911, BC, Ministry of Environment, Lands and Parks, Surveyor General's Branch (ICC Documents, p. 207).

After April 1, 1912, Thompson's employment as a teacher was terminated. However, trouble continued. He refused to move out of a house he had built some years earlier on the land surveyed by Mr Rhodes and he agitated to have the foreshore remain part of his pre-emption.[77] For Indian Affairs, Special Commissioner J.A.J. McKenna reported, in August 1912, that the Minister of Lands had agreed to eliminate from Mr. Thompson's pre-emption the Indian schoolhouse and the two graveyards. He noted that, according to the plan furnished by the Deputy Minister of Lands to the Homalco, the whole of the waterfront would have been taken from Mr. Thompson's pre-emption, but "on representations subsequently made by Mr. Thompson, it was arranged that a portion of the water-front should remain as part of his pre-emption, and a survey of the amended addition has been made by the Department of Indian Affairs. . . ." He wrote Deputy Minister Renwick about this concluding: "I shall be pleased to hear that the land has been eliminated from the pre-emption and added to the Reserve."[78]

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[74] Byrne to W.E. Ditchburn, Inspector of Indian Agencies, January 12, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 190-92).

[75] Ditchburn to Secretary, Indian Affairs, January 19, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp.193-95).

[76] CLSR, Rhodes, Field Book BC 259 (ICC Documents, pp. 204-06); Plan TBC 132 "Aupe Indian Reserve," Indian Affairs Survey Record (ICC Documents, p. 203).

[77] Byrne to Secretary, Indian Affairs, July 11, 1912, NA, RG 10, vol. 1476, mem C-14276 (ICC Documents, p. 229); Ditchburn to Renwick, August 1, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 234-37).

But Deputy Minister Renwick had no intention of adding this land to the reserve at that time because, for the previous few years, the province had had a policy of not allowing any public lands to be made into Indian Reserves.[79] He therefore instructed the Surveyor General merely to eliminate the land from the pre-emption, if Rhodes's survey was satisfactory.[80] Thompson was asked to return his pre-emption record so the amendment excluding the parcel of land (10 by 30 chains) could be made.[81]

A month later, in September 1912, representatives of Canada and British Columbia entered into an agreement whereby the Royal Commission on Indian Affairs for the Province of British Columbia (McKenna/McBride Royal Commission) was established to adjust the acreage of Indian reserves in the province.[82]

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[78] McKenna to Renwick, August 10, 1912, BC, Lands, Roll 2236 (ICC Documents, pp. 238-39).

[79] Ditchburn to Byrne, August 31, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp. 246-47).

[80] Renwick to Surveyor General, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 242).

[81] Deputy Minister, Lands, to Thompson, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 243).

[82] McKenna/McBride Memorandum of Agreement, September 24, 1912 (ICC Documents, p. 253).

Thompson never did return his pre-emption record for amendment. The school burned to the ground on February 25, 1913.[83] Thompson opposed the reconstruction of the school on the old site and appealed to the Royal Commission in November 1913.[84] Although the Royal Commission considered the subject of Thompson's protest beyond the scope of its authority, it was drawn into the dispute.[85]

Royal Commission Report and Death of William Thompson, 1914-15

After some investigation the Royal Commission advised the Provincial Secretary of British Columbia, in January 1914, that it had "specified" a 30-acre (more or less) tract of land, "subtracted from the pre-emption of Wm. Thompson," as land which should be reserved for the Homalco "as an addition of the Aupe Indian Reserve No. 6."[86] At about the same time, a notice appeared in the *British Columbia Gazette* listing the lands surveyed by Mr. Rhodes as "Lot 430, Coast District, Range 1." Persons considering their rights adversely affected were requested in the notice to state their contention to the Minister of Lands within 60 days.[87]

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[83] Agent Peter Byrne to Secretary, Indian Affairs, March 19, 1913, NA, RG 10, vol. 1477, mfm C-14276 (ICC Documents, p. 260).

[84] Copy of Thompson to Byrne, November 4, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 277).

[85] J.G.H. Bergeron, Secretary, Royal Commission, to Thompson, November 8, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 279); J.D. McLean, Secretary, Indian Affairs, to Bergeron November 20, 1913, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, pp. 281-82).

[86] Secretary, Royal Commission, to H.E. Young, Provincial Secretary, January 23, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, pp. 289-90).

In February 1914, Deputy Minister Renwick finally followed up on his 1912 letter to Thompson instructing him to return the pre-emption record for amendment: "I do not find that you have complied . . . unless you do so forthwith your Pre-emption Record will be cancelled."[88] Thompson steadfastly refused, suggesting that an even smaller amount be subtracted from the 160 acres:

> I am well satisfied that by taking 15 or 20 x 10 chains, for School House and Grave Yard, would be satisfactory both to me, and the Indians, which would leave me with my improvements, and the Post Office, where I am, without doing any injustice to anyone.
>
> . . . Please send a surveyor, and have the land surveyed, that I may know what is left me out of the 160 acres, called for in Preemption Record No. 2851.
>
> Please hurry up before the Indian Department finds any more old graves. The woods are full of them.[89]

Although Deputy Minister Renwick did not receive the pre-emption record, he did remind Thompson later that month that "it has been decided to eliminate a parcel measuring 10 x 30 chains as surveyed on the ground by Mr. Rhodes." He advised Thompson to "govern yourself accordingly."[90]

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[87] G.H. Dawson, Surveyor General, *British Columbia Gazette*, January 29, 1914 (ICC Documents, p. 292).

[88] Deputy Minister, Lands, to Thompson, February 3, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 297).

[89] Thompson to Deputy Minister, Lands, February 10, 1914, BC, Lands, Roll 2236 (ICC Documents, pp. 299-300).

[90] Deputy Minister, Lands, to Thompson, February 20, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 301).

In a letter to the Royal Commission, Deputy Minister Renwick summarized the status of the approximately 30 acres as follows:

> An addition to Aupe Reserve No. 6. Graves and schoolhouse. This parcel of land has been surveyed and is known as Lot No. 430, Range 1, Coast District, consisting of 29.7 acres. The disposition of the same will be held pending the decision of the Commission.[91]

Commissioners from the Royal Commission visited Church House where Chief Harry explained why the Homalco should have the land that Thompson refused to give up. Outlining events since 1909, the Chief appealed to the Commission to order Thompson off the land. "Furthermore," the Chief said, "we think that we are entitled to some payment from him." The Homalco wanted $300 rent for the schoolhouse from the time the Thompsons set up the post office and store.[92]

While the province was awaiting a ruling from the Royal Commission on the affair, William Thompson died. His wife wrote Deputy Minister Renwick: "my husband died on . . . 21st of June . . . I am left everything . . . his preemption No. 2851 should pass to my name. . . ."[93] Only three months before his death, William Thompson had anxiously reminded the Deputy Minister of the imminent expiry of his right to pre-empt the land:

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[91] Deputy Minister, Lands, to J.G.H. Bergeron, Secretary, Royal Commission, April 21, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 307).

[92] Chief George Harry, February 23, 1915, Royal Commission, Transcript of Proceedings, pp. 310-22 (ICC Documents, pp. 320-34).

[93] Mrs. Thompson to Deputy Minister, Lands, July 3, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 337).

> you know that my Preemption Record No. 2851, runs only to the 13th of April, 1915. Something must be done, I will do all I can to comply with the Law, if you will give me your instructions.[94]

If any special steps were taken by the province to deal with the April 13, 1915, expiry, they are not evident from the available record. It appears Deputy Minister Renwick simply reminded Emma Thompson that his Department would have to receive a survey of the pre-emption arranged by her (or her late husband) showing the exclusion of the 10-by-30-chain parcel of land before it could settle the case.[95]

Interim Report No. 84, issued by the Royal Commission on August 12, 1915, resolved that close to 30 acres be eliminated from Thompson's 160 acres:

> . . . a parcel of land containing an area of twenty-nine and seven one hundredths [later corrected to "tenths"] (29.7) acres, which has been subtracted by the Department of Lands . . . from Preemption Record No. 2851 . . . be constituted a Reserve for the use and purposes of the Indians of the said Homalco Tribe, of the New Westminster Agency.[96]

Mrs. Thompson's immediate reaction was to start building a house on the disputed property. Indian Agent Byrne urged her "not to invite the ill will of the

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[94] Thompson to Deputy Minister, Lands, March 17, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 335).

[95] Deputy Minister, Lands, to Mrs. Thompson, July 10, 1915, BC, Lands, Roll 2236 (ICC Documents, p. 338).

[96] Minutes of Proceedings, August 12, 1915, Royal Commission, Book of Proceedings, 1914-1915, vol. 2 (March 23, 1914 - December 30, 1915), DIAND, Indian Lands Registry, (ICC Documents, pp. 838, and 340-42); Royal Commission, Report, August 12, 1915, DIAND, Region, E5673-552 (ICC Documents, p. 339); McLean, Indian Affairs, to Gibbons, Royal Commission, January 11, 1916, NA, RG 10, vol. 4063, file 406,521, pt. 2, mfm C-10182 (ICC Documents, p. 352).

Indians living on the Aupe Reserve, by doing anything on the land in dispute until the question of title is settled."[97] He urged Chief George Harry to advise his people not to take "the law into their own hands."[98]

Canada Recommends 29.7 Acres for Indian Reserve, 1916

By Order in Council PC 388, February 22, 1916, the federal government recommended that close to 30 acres become available to the Band:

> 29.7 acres, which have been subtracted by the Department of Lands of the province of British Columbia, at the request of the Commission, from pre-emption record No. 2851 issued in the name of William Thompson . . . be constituted as an Indian Reserve for the . . . Homalco tribe . . . upon the consent of the Lieutenant Governor of the said province . . .[99]

As required under the agreement setting up the Royal Commission, the federal government turned the matter over to the province.

In forwarding the Order in Council to Premier W.J. Bowser, the Deputy Superintendent General of Indian Affairs pointed out that Thompson's widow not only remained on the subject land but had been building on it. He called for "early action" to terminate this "unsatisfactory condition" and requested "a concurrent

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[97] Byrne to Mrs. Thompson, September 15, 1915, NA, RG 10, vol. 1482 (ICC Documents, p. 347).

[98] Byrne to Chief Harry, September 15, 1915, NA, RG 10, vol. 1482 (ICC Documents, p. 348).

[99] Order in Council PC 388, February 22, 1916, Governor General in Council, Privy Council Office, BCARS, GR 672, box 2, file 35 (ICC Documents, pp. 359-60).

Order in Council" so Indian Affairs could deal with the matter.[100]

While Mrs. Thompson exhibited what Indian Agent Byrne described as a "defiant attitude towards the Governments," the province of British Columbia proved almost as intransigent as the Thompsons.[101] It never issued a matching Order in Council to make the 29.7 acres reserve land.

Province Recommends 20 Acres for Indian Reserve, 1917

On February 14, 1917, the province accepted a second payment of $40 on the lands described by Pre-emption Record No. 2851, land being purchased by "Wm. Thompson."[102] In the spring, Mrs. Thompson asked the Department of Lands to survey the 160 acres as soon as possible because her "brother-in-law and his sons [were] anxious to begin clearing the land for agricultural purposes . . ."[103]

A new Deputy Minister of Lands, G.R. Naden, reported in May 1917 that the matter was still unresolved:

> Mr. Thompson refused to return his record for [amendment], and so far the elimination [of 29.7 acres] has not been actually made, although the survey of the parcel has been gazetted . . .[104]

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[100] D.C. Scott, Indian Affairs, to W.J. Bowser, Premier, BC, February 24, 1916, DIAND, Region E5673-552 (ICC Documents, pp. 361-62).

[101] Byrne to Chief Harry, March 24, 1916, NA, RG 10, vol. 1483 (ICC Documents, p. 365).

[102] Certificate of Purchase, February 14, 1917, signed by J. Mahony, Government Agent, BC, Lands, Roll 2236 (ICC Documents, p. 375).

[103] Mrs. Thompson to T.D. Pattullo, Minister of Lands, April 24, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 377).

[104] G.R. Naden, Deputy Minister, Lands, to Pattullo, Minister, Lands, May 23, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 383-87).

He felt "there is nothing further to be done" other than to cut off the 10-by-30-chain portion, "the survey of the Thompson pre-emption to be confined to the remaining ground covered by his record."[105] Mrs. Thompson was so advised and told to make arrangements with a "duly authorized surveyor" whom she was to have contact the Department of Lands for instructions.[106] Before this could occur, however, Chief Forester W. Ross Flumerfelt undertook further investigations for the province.

Flumerfelt's September 1917 report was favourable to Mrs. Thompson's position even though she said little to Flumerfelt and lacked the documents to back up her case. Flumerfelt cast doubt on "the Indians' story," writing that "their statements are not to be relied upon." He recommended the boundary be just south of the large graveyard partly because the question of the small graveyard further south is "dubious." If the Indians were unwilling to move their graves or have access to the small graveyard only by water, as Mrs. Thompson suggested, then Flumerfelt thought the small graveyard "should be disregarded."[107]

On December 4, 1917, Deputy Minister of Lands Naden advised Indian Affairs and Mrs. Thompson that the "final settlement" would be to eliminate 20 acres:

> it has been decided to reduce the area in the said Lot 430 by shortening the North and South boundaries thereof to 20 chains, thus eliminating from the preemption a parcel measuring 10 x 20 chains, the south

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[105] Ibid.

[106] Deputy Minister, Lands, to Mrs. Thompson, June 13, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 388).

[107] Flumerfelt, Report, c. September 5, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 394-400).

> boundary of which will run approximately between your dwelling and the larger Indian burial ground.
>
> . . . The above decision will leave your store building and other improvements on the lands to be allotted in the Preemption Record and eliminate the same from the parcel claimed by the Indians. In addition the small burial ground lying further south will be surveyed separately and also eliminated from the preemption . . .
>
> It must be understood that this is a final settlement of the difficulty and the surveys on the ground must be carried out accordingly.[108]

This was how the province reconciled itself to the elimination of acreage from the Thompson pre-emption.

Reaction to 20-Acre Settlement, 1918-22

The Lands Department's December 4, 1917, letter conveying its "final" 20-acre solution prompted Mrs. Thompson to forward a sketch showing "all I can spare" which, of course, was a still smaller area.[109] The Chief Inspector of Indian Agencies accepted the outcome:

> [T]he arrangement arrived at early in the month of December is quite satisfactory, and it is now understood that the addition to this reserve shall consist of a portion measuring ten chains in width along the northerly limit of the said reserve and twenty chains in depth, also a

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[108] Deputy Minister, Lands, to Mrs. Thompson, December 4, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 409-10).

[109] Mrs. Thompson to Deputy Minister, Lands, January 15, 1918, BC, Lands, Roll 2236 (ICC Documents, pp. 414-15).

> small lot to the south on the shore line of the Inlet to include the small Indian cemetery.[110]

Mrs. Thompson's attempts to have the final decision overturned revealed that she intended to utilize timber on the land. She complained that the 10-by-20-chain area would block "the only right of way to the back of the Claim."[111] She begged for a survey as soon as possible to allow her to dispose of timber.[112]

A survey of the pre-emption and future reserve lands – Lot 1835 adjoining Aupe 6 and Lot 1836 for the small graveyard – was completed September 24, 1918.[113] Mrs. Thompson refused to sign the required approval forms. She returned the plan to the surveyor indicating on it "the only way I would be willing to surrender the so called Indian Settlement." She wanted it understood that

> the small grave yard (or lot 1836) will be return [sic] to Pre-empt. Record 2851 as soon as arrangement can be made to remove the bodies to where they should be in the main Grave yard.[114]

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[110] Ditchburn, Indian Affairs, to Nadon, Deputy Minister, Lands, February 1, 1918, and Ditchburn to Secretary, Indian Affairs, January 19, 1918, BC, Lands, Roll 2236 (ICC Documents, pp. 416-18).

[111] Mrs. Thompson to Surveyor General, BC, June 23, 1918, BC, Lands, Roll 2236 (ICC Documents, p. 422).

[112] Mrs. Thompson to Surveyor General, BC, July 3, 1918, BC, Lands, Roll 2236 (ICC Documents, p. 424).

[113] H.H. Roberts, BCLS, Field Notes, September 24, 1918, and Affidavit, November 8, 1918, BC, Ministry of Environment, Surveyor General's Branch (ICC Documents, pp. 429-32).

[114] Mrs. Thompson to H.H. Roberts, January 10, 1919, BC, Lands, Roll 2236 (ICC Documents, p. 433).

Nevertheless, Lots 1834, 1835, and 1836 were gazetted together on June 19, 1919.[115]

In 1922 Mrs. Thompson finally took steps to clear up the balance owing on Pre-emption Record 2851. Previous to this, she had been ignoring requests to complete the payment on Lot 1835.[116] In November 1922 her lawyers forwarded all but $6.25 of the balance owing. This gesture was because Mrs. Thompson was "holding out" for a grant of one and a half chains "of her garden." She thought this would "not be objectionable to the Indians."[117] The province refused to reopen the matter, however, and full payment was recorded on November 29, 1922.[118] The completed certificate of purchase shows a total of $180.20, including interest, received on Pre-emption Record No. 2851 for 145 acres.[119]

Indian Reserve 6A and Thompson Grant, 1924

Provincial Order in Council 911, July 26, 1923, amended the acreage for Aupe IR 6A from the Royal Commission's original suggested acreage of 29.7 acres to a final figure of 20.08 acres.[120] Canada passed reciprocal Order in Council 1265, July 21, 1924, approving 20.08 acres.[121] The figure 20.08 acres for Aupe IR 6A represents the 10-by-20-chain area adjoining Aupe IR 6 plus the separate small cemetery containing 0.08 acres.[122]

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[115] J.E. Umbach, Surveyor General, *British Columbia Gazette*, June 19, 1919, p. 1981 (ICC Documents, p. 439).

[116] Government Agent, Lands, to Superintendent of Lands, June 13, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 460).

[117] O'Brian & McLorg to Government Agent, Lands, November 28, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 471).

[118] Superintendent of Lands to Government Agent, Lands, December 9, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 473).

[119] Certificate of Purchase No. 640, signed by J. Mahony for Lands, December 14, 1922, BC, Lands, Roll 2236 (ICC Documents, p. 474).

On October 1, 1924, Emma Thompson acquired title to the 145 acres in Lot 1835 by Crown Grant No. 2759/498.[123] The 145 acres represented 91 percent of the 160 acres which William Thompson originally applied for in 1910.[124]

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[120] Schedule of New Reserves, Ditchburn-Clark, BC Order in Council 911, July 26, 1923, p. 48 (ICC Documents, p. 476).

[121] Canada Order in Council 1265, July 21, 1924.

[122] W.J. McGregor, Land Administration Officer, to Chief Wilson Ambrose, Church House, September 22, 1972, DIAND, Region E5673-552 (ICC Documents, pp. 509-10).

[123] BC, Land Act, Grant No. 2759/478 (ICC Documents, pp. 494-95).

[124] The percentage is rounded from 90.625 percent.

PART IV

ISSUES

The overall question which this Commission has been asked to inquire into and report on is whether Canada properly rejected the claim of the Homalco Indian Band. In other words, does Canada have an outstanding lawful obligation, as set out in *Outstanding Business*, to the Band? To facilitate the Commission's review of this matter, counsel for the Band and Canada attempted to agree on a list of the specific issues relevant to this inquiry. Unfortunately, they were unable to agree on how the issues should be framed. The statement of issues suggested by counsel for each party is attached to this report as Appendix B.

Although we appreciate the work of both counsel, we prefer to state the issues as follows:

1 Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

2 Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

3 Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

PART V

ANALYSIS

ISSUE 1

Did Canada breach a lawful obligation in the allotment process for Aupe IR 6?

Much of the controversy surrounding the original allotment of Aupe IR 6 arises from the inconsistencies between the various sketches and written descriptions of the reserve and from the inconsistencies in Commissioner O'Reilly's Minute of Decision itself.

The Band submits that Commissioner O'Reilly's Minute of Decision of August 10, 1888, was the legal instrument which allotted the Aupe No. 6 reserve. By that Minute of Decision, Aupe No. 6 was to comprise 25 acres; the description of 25 acres was determinative. In other words, any inconsistencies in the Minute of Decision between the acreage description and the metes-and-bounds description were governed by the former. The Band maintains that the Minute of Decision was approved by both the Deputy Superintendent General of Indian Affairs and the Chief Commissioner of Lands and Works of British Columbia in January 1889. It argues that Mr. Skinner's subsequent 14-acre survey plan was tantamount to a wrongful alienation of 11 acres from Aupe IR 6.

Canada submits that the reference to "twenty-five (25) acres" in Commissioner O'Reilly's Minute of Decision was not the determining factor in defining the size of the proposed reserve. Rather, the determining factor was the metes-and-bounds description which was also contained within the Minute of Decision. Canada supports its conclusion by analogy to caselaw dealing with the interpretation of descriptions in deeds or grants. Canada maintains that, since Mr.

Skinner followed the metes-and-bounds description, his survey of 14 acres for Aupe IR 6 accurately defined the size of the reserve. In any event, Canada argues that Commissioner O'Reilly's Minute of Decision did not, itself, create Aupe IR 6. The reserve could not have been "created" until a survey was completed in accordance with the instructions contained in the Minute of Decision and then approved by the Chief Commissioner of Lands and Works for the Province and the Indian Superintendent for the Dominion Government. Canada argues that the reserve was never approved as being 25 acres by both levels of government, as was required by the legislation empowering Commissioner O'Reilly. As a result, a reserve was never established of that acreage, and there was consequently no alienation, unlawful or otherwise, of 11 acres.

To determine the true quantity of land allotted by Commissioner O'Reilly, the appropriate approach in our view is to focus on the intentions of the parties at the time of the allotment rather than on technical rules of interpretation. In other words, what land did Commissioner O'Reilly intend to set apart for the Homalco people? And what land did the Homalco people expect to receive?

In taking this approach, we agree with Canada that the acreage description in the Minute of Decision is not *necessarily* determinative of the size of the reserve. During his trip in August 1888, in addition to Aupe No. 6, Commissioner O'Reilly allotted a number of other reserves for the Sliammon, Klahoose, and Homalco tribes.[125] It appears that the acreage quoted by Commissioner O'Reilly for these reserves typically did not accord with their metes-and-bounds descriptions. This is amply illustrated in Table 1, which Blair Smith provided in his second report.

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[125] P. O'Reilly to the Superintendent General of Indian Affairs, December 8, 1888 (ICC Documents, pp. 34-41).

TABLE 1

Areas of Reserves Allotted by O'Reilly for the Sliammon, Klahoose and Homalco Bands, August 2 to 12, 1888, in acres

Reserve	**Estimated area according to Minute of Decision**	**Area by Survey**
	Sliammon Band August 6, 1888	
Sliammon 1	1930.00	1924.50
Harwood Island 2	2075.00	2095.00
Paukeanum 3	200.00	200.00
Tokwana 4	430.00	395.50
Tokenatch 5	50.00	53.00
Kahkaykay 6	36.00	45.00
	Klahoose Band August 12, 1888	
Klahoose 1	2395.00	2280.00
Quaniwsom 2	1.50	0.75
Salmon Bay 3	200.00	200.00
Siakin 4	8.00	7.00
Deep Valley 5	70.00	61.00
Quequa 6	6.00	4.00
Tork 7	650.00	698.00
Squirrel Cove 8	43.00	39.00
Ahpokum 9	70.00	62.00
	Homalko Band August 10, 1888	
Homalko 1	1100.00	710.80
Homalko 2	32.00	9.50
Potato Point 3	0.50	0.40
Orford Bay 4	680.00	671.30
Mushkin 5	10.00	10.50
Aupe 6	25.00	14.00

Source: Blair Smith, Manager, Survey Program, Energy Mines and Resources Canada to Sarah Kelleher, Counsel, Specific Claims West, April 11, 1995 (ICC Exhibit 3).

As Table 1 demonstrates, the actual area by survey was sometimes more and sometimes less than the area described by Commissioner O'Reilly. Given the frequent discrepancy between the acreage and metes-and-bounds descriptions in Commissioner O'Reilly's Minutes of Decision, it seems reasonable to assume that his mention of 25 acres with respect to Aupe No. 6 was only an estimate of the actual quantity of land allotted. We accept that Commissioner O'Reilly likely could not have stated with absolute certainty the acreage of the reserve until after the survey was completed.

Although we agree that the acreage description does not, by itself, determine the size of the reserve, we find it difficult to accept Canada's narrow argument that the metes-and-bounds description must always govern. We take this position for two reasons. First, it is unlikely that the Homalco people held a complete understanding of European land measurement. This is reflected in notes kept by Surveyor Green during Commissioner O'Reilly's visit with the Homalco at Orford Bay. He recorded as follows:

> Homalco Indians
> Orford Bay Aug 8th, 1888
>
> *William Chief*. . . . I am Chief of all the tribes, Klahoose, Sliammon and Homalco. There are 35 males here now. Our potatoes are a mile up the river. I am sorry my land is not surveyed. That's why I am glad to see you. I want a large piece as we always stop here. I have plenty of children and if I do not have a large piece they will be poorly off.
>
> I want the mountain base to be my boundary and from a point where I am working to another about (blank) miles north.
>
> I want four miles back from the coast.
>
> *Commissioner* I intend to give you the good land about your houses, but what is the use of giving you these bare rocks. I don't want to limit

you, but I don't think you know what four miles are.[126]

Therefore, it is doubtful that both parties could have intended either a metes-and-bounds or an acreage type of description to be the sole identification of the boundaries of Aupe IR 6. Secondly, Commissioner O'Reilly's Minute of Decision was not a stand-alone document. Sketches and notes were also produced in 1888 to record the intentions of Commissioner O'Reilly and the Homalco people. The descriptions of Aupe IR 6 in the Minute of Decision must be considered in conjunction with this other evidence.

Sketches of Aupe IR 6

We turn first, then, to the sketches. Surveyor Green produced a sketch of the proposed reserve on August 9, 1888, as shown in **Figure A**. Commissioner O'Reilly also prepared a sketch of the area in question which accompanied his Minute of Decision dated August 10, 1888. It is reproduced here as Figure B. Finally, for purposes of comparison, Figure C shows Mr. Skinner's survey plan which ultimately left Aupe IR 6 with 14 acres. Mr. Smith indicates in his reports that Mr. Skinner surveyed the reserve precisely as described by the metes-and-bounds description in the Minute of Decision, starting from the fir tree marked by Commissioner O'Reilly (located in the bottom right-hand corner of the survey sketch).[127]

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[126] Reproduced in Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada, to Sarah Kelleher, Counsel, Specific Claims West, April 11, 1995, p. 9 (ICC Exhibit 3).

[127] Blair Smith, Manager, Survey Program, Energy, Mines and Resources Canada, to Sarah Kelleher, Counsel, Specific Claims West, December 6, 1994 (ICC Exhibit 2); Blair Smith to Sarah Kelleher, April 11, 1995 (ICC Exhibit 3).

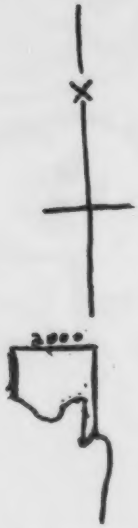


Figure A Green's sketch of August 9, 1888

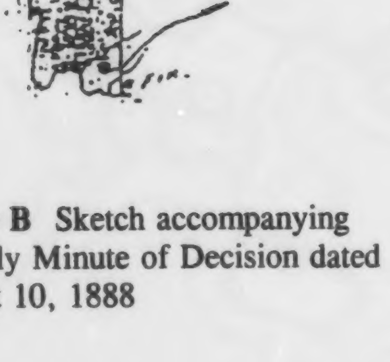

N° 6
AUP
25 ACRES.

Figure B Sketch accompanying O'Reilly Minute of Decision dated August 10, 1888

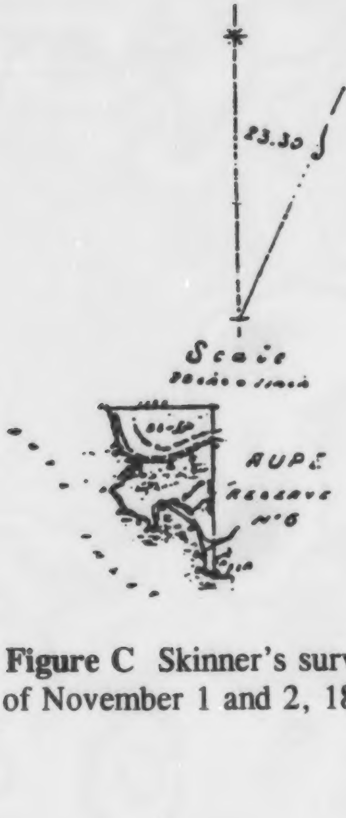

23.30
Scale
AUPE
RESERVE
N°6

Figure C Skinner's survey of November 1 and 2, 1888

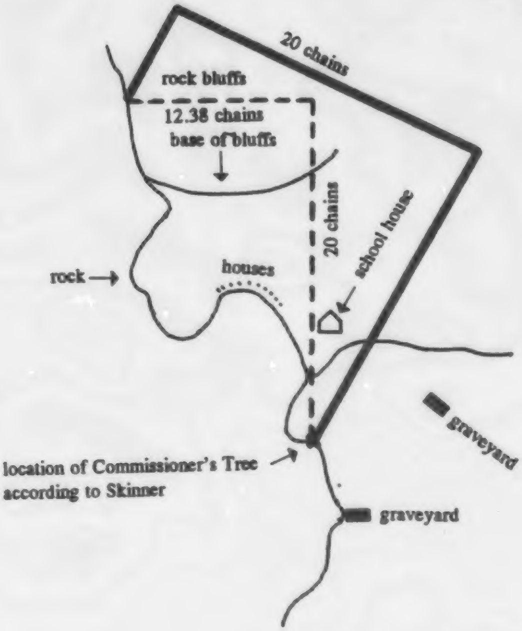
Green's Sketch

Mr. Green's sketch (Figure A) depicts the westerly boundary of the reserve as rectilinear and clearly shows the length of the north boundary as 20 chains. If we compare Mr. Green's sketch with Mr. Skinner's survey plan (Figure C), a discrepancy is immediately apparent. Not only do they differ geographically, the north boundary on Mr. Skinner's survey plan is substantially less than 20 chains. The contrast is more clearly seen if we take Mr. Green's sketch, rotate it and then overlay it on Mr. Skinner's survey plan as shown in Figure D.

Figure D Sketch plan showing physical features of Aupe IR 6 in August 1888, overlaid with sketch plans of Skinner's survey and Green's Sketch.

▬ Sketch plan: Green's sketch of August 9, 1888

-------- Sketch plan: Skinner's survey of November 1 and 2, 1888


20 chains
rock bluffs
12.38 chains
base of bluffs
20 chains
school house
houses
rock
graveyard
location of Commissioner's Tree according to Skinner
graveyard

There are at least four possible explanations for the discrepancy between Mr. Green's sketch and Mr. Skinner's survey plan:

1) Mr. Green mistook the location of north.

2) Mr. Green misjudged the shape of the seashore. More specifically, he presumed that the configuration of the seashore was such that the north boundary could be 20 chains in length, whereas, in reality, the north boundary intersected the seashore at 12.4 chains from the northeast corner.[128]

3) When the fir tree was marked signifying the point of commencement for the survey, Commissioner O'Reilly misjudged the point of intersection of the east boundary of the reserve with the shoreline and so chose the wrong starting point for his allotment.[129]

4) When Mr. Skinner surveyed the reserve, he made an error in the calculation of declination (the difference between geomagnetic and true north) resulting in the north/south easterly boundary cutting across the mouth of the creek, rather than being well back of the mouth, as it was in both O'Reilly's sketch (Figure B) and Green's sketch (Figure A). Figure D would then be, in our opinion, a likely representation of the intention of the parties.

At this point in time, over 100 years later, we can only speculate as to why Mr. Skinner's survey diverged so drastically from Mr. Green's sketch of August 9, 1888. We note, however, that concerns were raised about Mr. Skinner's professional qualifications by the President of the Association of Dominion Land Surveyors which leads us to the fourth explanation outlined above.[130]

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[128] Blair Smith to Sarah Kelleher, December 6, 1994 (ICC Exhibit 2).

[129] Gamble, "Report on Acreage Discrepancy," note 13 above, p. 4 (ICC Exhibit 4).

[130] President, Association of Dominion Land Surveyors, to Minister of the Interior and Superintendent General of Indian Affairs, March 27, 1889, in ibid., tab 9 (ICC Exhibit 4).

O'Reilly's Sketch

Commissioner O'Reilly's sketch (Figure B) provides another contrast to Mr. Green's sketch of August 9, 1888 (Figure A). The north boundary on Commissioner O'Reilly's sketch is of unspecified length. However, the east boundary is clearly identified as being 20 chains. In addition, the westerly boundary appears to include the coastline instead of a rectilinear boundary. We have no evidence that Commissioner O'Reilly ever compared his sketch with that of Mr. Green before sending it to Mr. Skinner along with instructions to carry out the survey of the Homalco reserves. Furthermore, it appears that Commissioner O'Reilly did not send Mr. Green's sketch to Skinner along with his surveying instructions. What remains abundantly clear is that Mr. Skinner's ultimate survey plan does not visually correspond to either Commissioner O'Reilly's or Mr. Green's sketch. It should be noted that both Green's sketch and O'Reilly's sketch show the north/south easterly boundary as well back of the mouth of the creek. They were both present at the time the agreement was entered into with Chief Timothy and the Homalco.

Other Documents

Given the discrepancies between the sketches, they provide inconclusive evidence of the intentions of the parties as to the boundaries of Aupe IR 6. Hence, we must turn to other documents.

In addition to his sketch, Mr. Green made the following notes on August 9, 1888:

> 10 houses
> Winter Village
> Near Bartlett Island
> Nothing but the houses. No land.
> Fire wood only[131]

The reference to 10 houses and the firewood is supported by comments made in Commissioner O'Reilly's report to the Superintendent General of Indian Affairs on December 8, 1888:

> No. 6 Aupe, a well sheltered spot at the entrance to Bute Inlet, near Bartlett Island, upon which ten small houses stand. There is plenty of timber for fuel, in other respects it is valueless. This reserve contains 25 acres.[132]

As discussed above, the reference to 25 acres was likely an estimate. However, it is clear that the intentions of the parties were to set apart enough land for 10 small houses and timber for fuel. The purpose of both the acreage and the metes-and-bounds descriptions was to ensure that the physical features pointed out by Chief Timothy and the Homalco people were included in the reserve. In the end it did not matter whether the reserve was of 25 acres or as described by metes and bounds; what counted was that the land that the parties agreed to was included in the final survey. This could have been 25 acres, it could have been more, or it could have been less. We would note that from our visit to Aupe IR 6 on April 18, 1995, it is unlikely that the reserve as surveyed represented the wishes of the Homalco, in that Skinner's survey includes a large piece of unusable rockface that they were unlikely to have requested and that would have been useless for "timber for fuel."

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[131] CLSR, Field Book BC 457, in Gamble, "Report on Acreage Discrepancy," note 13 above, tab 5 (ICC Exhibit 4).

[132] P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

From the subsequent actions of the Homalco, one could argue that they intended the reserve boundaries to encompass at least the area of the future schoolhouse. There is considerable evidence that they believed this building was on reserve until Mr. Thompson applied to pre-empt the land upon which it was situated.[133]

Whether this understanding of the reserve boundaries accorded with that of Commissioner O'Reilly is difficult to say. We do not agree that Commissioner O'Reilly's approval of Mr. Skinner's survey plan inevitably leads to the conclusion that his agreement with the Homalco people on August 9-10, 1888, pertained to only 14 acres of land. The best evidence that we have as to O'Reilly's intentions is his own sketch, which, as we pointed out above, shows the north/south easterly boundary well back of the mouth of the creek. If this had been the boundary as surveyed by Skinner, the schoolhouse clearly would have been on the reserve, as can be seen from Figure D above. It is unclear whether he was aware of the discrepancy between the acreage description in the Minute of Decision and the acreage shown on the survey plan. Following the production of these two documents, there should have been a chain of events which provided answers as to the land that Aupe IR 6 was meant to include. Instead, the unprofessional conduct of those involved has insured that there are now more questions than answers.

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[133] A.S. Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); R.C. McDonald, Indian Agent, to Secretary, Department of Indian Affairs, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41); J.D. McLean, Secretary, to Charles Renwick, Deputy Commissioner, Lands Department, January 20, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 145-46). The Band was not alone in its belief that the school was on reserve land. There is evidence that departmental officials held the same belief; see, for example, A.S. Green to J.D. McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37).

Mr. Skinner surveyed the land, but his survey did not turn out to be 25 acres and it did not resemble Commissioner O'Reilly's sketch. Realizing that there was a discrepancy, Mr. Skinner should have notified Commissioner O'Reilly and, logically, there should be some record of the exchange between the two. Furthermore, before Commissioner O'Reilly approved the survey of the reserve, he should have compared Mr. Skinner's survey with his notes and Mr. Green's sketch. Had he done so, he would have noticed the discrepancy. This ought to have resulted in a fresh survey that would have put the schoolhouse within the boundaries of the reserve.

Actions of Indian Superintendent

Perhaps of equal or greater importance is the lack of recorded action on the part of the Indian Superintendent for British Columbia. It is clear from the Order in Council appointing Commissioner O'Reilly that the Indian Superintendent was meant to play an important supervisory role in the reserve allotment process:

> the Reserve Commissioner . . . should act on his own discretion, in furtherance of the joint suggestions of the Chief Commissioner of Lands & Works, representing the Provincial Government, and the Indian Superintendent, representing the Dominion Government, as to the particular points to be visited, and Reserves to be established; *and that the action of the Reserve Commissioner should in all cases be subject to confirmation by those Officers;* and that, failing their

> agreement, any and every question at issue between them should be referred to the Lieutenant Governor, whose decision should be final and binding.[134] [Emphasis added.]

We have found no evidence that the Indian Superintendent ever confirmed the action of Commissioner O'Reilly in relation to Aupe IR 6. It appears that the only document involving the Indian Superintendent was a letter from Commissioner O'Reilly to the Indian Superintendent in March 1893 forwarding tracings of the original plots of reserves finally approved by the Chief Commissioner of Lands and Works.[135]

Canada suggests that the approval required by Canada under the Order in Council was given by Commissioner O'Reilly on May 4, 1891, and the Band submits that it was given by the Deputy Superintendent General of Indian Affairs on January 4, 1889.[136] However, in our view, the approval of neither Commissioner O'Reilly nor the Deputy Superintendent General automatically absolved the Indian Superintendent from also reviewing the action of Commissioner O'Reilly. Indeed, it would be quite incongruous if the Indian Superintendent could completely abdicate to Commissioner O'Reilly his responsibilities in this regard, considering that the latter's actions were the very actions that he was meant to monitor.

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[134] Order in Council, July 19, 1880 (ICC Documents, pp. 21-23). The term "Indian Superintendent" used here is somewhat ambiguous; however, it appears from later correspondence that it meant "Indian Superintendent for British Columbia" (Department of Indian Affairs to Patrick O'Reilly, August 9, 1880 [ICC Documents, pp. 24-28]).

[135] P. O'Reilly to A.W. Vowell, Indian Superintendent, March 3, 1893, NA, RG 10, vol. 1278, mfm C-13900 (ICC Documents, p. 59).

[136] We have some reservations about whether the Deputy Superintendent General of Indian Affairs, L.J. Vankoughnet, approved the Minutes of Decision on January 4, 1889. Vankoughnet acknowledged receipt of the "minutes of decision and sketches showing the Reserves defined by you for the tribes of Indians inhabiting portions of the North West Coast" (L.J. Vankoughnet to P. O'Reilly, January 4, 188[9] [ICC Exhibit 6]). It is unclear whether this acknowledgement constituted approval of the Minutes.

While we express no opinion on whether the Indian Superintendent's involvement was essential in every case, we find that, in the circumstances of this case, the Indian Superintendent's failure to fulfil his supervisory obligation as set out in the Order in Council constituted a "breach of an obligation arising out of . . . [a statute] pertaining to Indians [or] the regulations thereunder" within the meaning of Canada's Specific Claims Policy.[137] In this instance there was a large discrepancy between the acreage and the metes-and-bounds descriptions in the Minute of Decision, there was a complaint about Mr. Skinner's qualifications before the final survey plan was complete, and there were discrepancies between Mr. Skinner's survey plan and the sketches prepared by Mr. Green and Commissioner O'Reilly. Particularly when questions were raised about the surveyor's qualifications, one would expect the Indian Superintendent to have been careful in reviewing the survey plan and in resolving any inconsistencies before confirming the reserve allocation.

It may be argued that the Superintendent General, and not the Indian Superintendent, received O'Reilly's report, Minutes of Decision, sketches, and complaint regarding Mr. Skinner's qualifications; therefore, the Indian Superintendent had no knowledge and no reason for alarm. However, given our understanding of the relationship between the Superintendent General and the Indian Superintendent, we are of the view that the Indian Superintendent had or ought to have had all the relevant information.[138] If the information was not relayed to him, we are left with yet another example of the unprofessional handling of this file. Considering that the Order in Council expressly stated that the actions of Commissioner O'Reilly were subject to confirmation by the Indian Superintendent, the Superintendent General should have shared all information germane to the Indian Superintendent's task.

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[137] *Outstanding Business*, 20. In our view, the Order in Council appointing Commissioner O'Reilly can be encompassed within the term "statute" or "regulation." R. Dussault and R. Borgeat write that Orders in Council "are granted the same status as statute law before the courts"(*Administrative Law: A Treatise*, 2d ed. [Toronto: Carswell, 1985], 1: 61). In addition, when *Outstanding Business* was published in 1982, the *Interpretation Act* then in force (RSC 1970, c. I-23, s. 2(1)) included Orders in Council within the definition of "regulation." In any event, we note that in its written submission before this Commission, Canada referred to the Order in Council as "the *legislation* empowering O'Reilly" [emphasis added] (Submissions on Behalf of the Government of Canada, March 31, 1995, p. 9). Page 3 of *Outstanding Business* states: "The claims referred to in this booklet deal with specific actions and omissions of government as they relate to . . . requirements spelled out in *legislation* . . ." [emphasis added].

Question of Compensation

Although we find that Canada breached an obligation to review the actions of O'Reilly arising out of the Order in Council appointing O'Reilly, we are still left with the question of compensation or damages. Even assuming that it was the intention of all parties to allot the full 25 acres of land for Aupe IR 6 (and we have made no such finding), the missing 11 acres were in any event contained within the

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[138] The definitions of "Superintendent General" and "Agent" in the *Indian Act*, RSC 1886, c. 43, suggest that there was a reporting relationship between the Superintendent General and the Indian Superintendent for British Columbia:

> **2.** In this Act, unless the context otherwise requires, -
>
> (*a.*) The expression "Superintendent General" means the Superintendent General of Indian Affairs, and the expression "Deputy Superintendent General" means the Deputy Superintendent General of Indian Affairs;
>
> (*b.*) The expression "Agent," or "Indian Agent," means and includes a commissioner, assistant commissioner, *superintendent*, agent or other officer *acting under the instructions of the Superintendent General* [emphasis added].

20.08 acres allotted to the Band in 1923-24 as Aupe IR 6A. In its written submissions, the Band stated that, "[o]f the 20.08 acres finally confirmed in 1923, 11 acres were those same lands unlawfully alienated from Aupe #6 by means of survey in 1888-1889."[139] Thus, any wrongdoing in this regard was eventually remedied. Furthermore, compensation for loss of use is not readily apparent in this case, as the Band used the area in dispute for a schoolhouse, graveyards, and other improvements.

We do, however, see one way in which the Band suffered a loss as a result of the Indian Superintendent's failure to review the actions of Commissioner O'Reilly. If he had examined all the documents and had discovered that Mr. Skinner's survey plan did not reflect the true intentions of the Band and Commissioner O'Reilly, he ought to have taken action to adjust the survey plan. A properly adjusted survey plan would have placed the Band's future schoolhouse within the boundaries of Aupe IR 6. In such circumstances, Mr. Thompson would not have been able to use the school to satisfy his pre-emption residency requirements. The loss to the Band resulting from Mr. Thompson's pre-emption claim will be discussed in greater detail later in this Part, under Issue 3.

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[139] Brief of the Homalco Indian Band, March 31, 1995, p. 11, paragraph 73. See also, Brief of the Homalco Indian Band, March 31, 1995, p. 14, paragraph 80, and Response to Canada's Submission of March 31, 1995 by the Homalco Indian Band, June 6, 1995, p. 13, paragraph 15.

ISSUE 2

Did Canada have an obligation to acquire 80 additional acres of reserve land when requested by the Band in 1907? If so, did Canada breach that obligation?

Whether the original allotment of Aupe IR 6 was meant to be 14 or 25 acres, it is clear that by 1907, the Band wished to extend its reserve boundaries. In September 1907 it requested 80 additional acres of reserve land immediately adjacent to Aupe IR 6. Canada's negative response to this request was the subject of the second issue raised before us.

The Band submits that its request for 80 additional acres of land was logical and necessary, particularly in light of the generally rocky topography of Aupe IR 6 and the Band's use and occupation of the adjacent lands both historically and in 1907. As we understand the Band's argument, Canada had a constitutional and fiduciary obligation to act in the best interests of the Band and to meet the Band's request for additional reserve lands. This obligation flowed from Article 13 of the *Terms of Union, 1871*, and from the unique historical relationship existing between the aboriginal peoples of Canada and the Crown. In addition, although it is not expressly stated, the Band appears to suggest that an obligation to acquire additional lands also arose from section 91(24) of the *Constitution Act, 1867.*[140]

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[140] The Band submits at page 12 of its "Evidentiary & Legal Synopsis," dated February 15, 1995, that the statement contained in Indian Agent McDonald's letter to Chief William that the Crown was not in a position to make further allotments of land for Indian purposes "does not reflect the constitutional / legal / equitable obligations of the Crown with respect to 'Indians,' 'Indian Lands,,' 'Lands reserved for Indians' or 'reserves'" (Brief of the Homalco Indian Band, March 31, 1995, tab D). Section 91(24) of the *Constitution Act, 1867*, assigns exclusive legislative authority for "Indians, and Lands reserved for the Indians" to the Parliament of Canada.

The Band maintains that Canada did not fulfil its obligation to it. Although the Band's request for 80 additional acres was forwarded by Indian Agent McDonald to the Indian Superintendent on November 16, 1907, there is no documentary evidence to demonstrate that

(a) this request was ever submitted by the Indian Superintendent to representatives of British Columbia;

(b) there was ever any meeting or other communication between the Indian Superintendent and British Columbia in relation to the request; or

(c) there was ever any specific decision made in relation to the request by British Columbia or between British Columbia and the Indian Superintendent.

At the very least, the Band asserts that Canada should have taken steps to purchase the 80 acres on behalf of the Band as there were no competing interests in relation to those lands in 1907.

Canada denies that it owed a fiduciary obligation to the Band to provide additional reserve lands upon request. It argues that Article 13 of the *Terms of Union* did not impose an obligation on the federal Crown in connection with the creation of reserves such that a request for additional reserve lands had to be fulfilled. With respect to there being any other form of agreement or undertaking on the part of the federal Crown, Canada maintains that there is no evidence that it either expressly or impliedly undertook to ensure that the Band would be provided with additional lands. Canada emphasizes that it could not have fulfilled a request for additional reserve lands without provincial cooperation; therefore, it could not have made any unilateral commitments in that regard.

In the alternative, if it did owe a fiduciary duty to provide additional reserve lands, Canada submits that it fulfilled its obligation. It argues that, since British Columbia held title to the lands in question, the only "power" or "discretion" it could have exercised was to request the province to grant the lands to Canada which Canada could then add to the Band's reserve. According to Canada, the evidence suggests that it did, in fact, make such a request but that it was refused. Furthermore, in his oral submissions, Mr. Becker argued that if an obligation did exist for Canada to acquire additional lands for the Band, that obligation only extended to the settlement lands (that is, the lands being used by the Band for its school and grave sites). Any fiduciary obligation which Canada might have had in relation to those lands was satisfied as they were ultimately acquired for the Band.[141]

In our view, the pivotal question here is whether Canada had a positive obligation to acquire and set apart reserve lands when requested by the Band (or at least to assist in doing so).

Section 91(24) of the *Constitution Act, 1867*

At the outset, we have difficulty with the Band's implicit suggestion that such an obligation arose from section 91(24) of the *Constitution Act, 1867*. Although section 91(24) defines who, between the provincial and federal governments, has legislative power with respect to "Indians" and "Lands reserved for the Indians," it does not *per se* create a legal obligation to establish reserves. This point was briefly addressed by Mr. Justice Addy in *Apsassin v. Canada*.[142] In discussing the Crown's fiduciary duty in that case, he remarked as follows:

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[141] ICC Transcript, June 9, 1995, pp. 60, 75-76.

> Finally, the provisions of our Constitution are of no assistance to the plaintiffs on this issue. The Indian Act was passed pursuant to the exclusive jurisdiction to do so granted to the Parliament of Canada by s. 91(24) of the Constitution Act, 1867. This does not carry with it the legal obligation to legislate or to carry out programs for the benefit of Indians anymore than the existence of various disadvantaged groups in society creates a general legally enforceable duty on the part of governments to care for those groups although there is of course a moral and political duty to do so in a democratic society where the welfare of the individual is regarded as paramount.[143] [Emphasis added by Addy J.]

Thus, although there may have been a moral or political duty for Canada to provide additional reserve lands for the Band, section 91(24) of the *Constitution Act, 1867*, did not create a legal obligation to do so.

Crown's Special Historical Relationship

We also have some difficulty relying on the Crown's special historical relationship, in and of itself, as the basis of a specific duty to obtain and convert lands to reserve status whenever requested by a band. As we mentioned in our *Primrose Lake Air Weapons Range Report II*, there is a distinction between a fiduciary relationship and a fiduciary duty:

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[142] *Apsassin v. Canada* (1987), [1988] 1 CNLR 73 (FCTD).

[143] Ibid. at 93. The Federal Court of Appeal did not address this point on appeal: *Apsassin v. Canada*, [1993] 2 CNLR 20 (FCA).

> We may begin with the proposition, articulated by the Supreme Court of Canada in [*Quebec (AG) v. Canada (National Energy Board)* (1994), 112 DLR (4th) 129 (SCC)], that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada. The Supreme Court has gone on to distinguish between a fiduciary relationship and a fiduciary duty: although there is a general fiduciary relationship between the Crown and the aboriginal peoples, this is not the same as a general, all-embracing fiduciary duty. A fiduciary obligation must be shown to arise in the specific circumstances of the relationship between the Crown and the claimants, because "[t]he nature of the relationship between the parties defines the scope, and the limits, of the duties that will be imposed." Thus, although the relationship may presumptively give rise to a fiduciary duty, one cannot assume that a fiduciary attaches to every aspect of the dealings between the Crown and aboriginal peoples.[144]

Thus, we must consider whether a fiduciary obligation arose in the specific circumstances of the relationship between Canada and the Band as a result of the Band's request for an additional 80 acres of land.

We are not persuaded that a request by a band for more land automatically generates a fiduciary obligation for Canada to acquire and set apart that land as reserve land. There must be some compelling reason for Canada to provide the land before Canada is fixed with a fiduciary obligation to take action. In this case, the Band suggests a number of reasons why Canada should have acquired 80 additional acres of reserve land when the Band made its request in 1907:

- Aupe IR 6 was rocky and unsuitable for cultivation as was reflected in the statements of Commissioner O'Reilly in 1888 and Indian Agent McDonald in

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[144] ICC, *Primrose Lake Air Weapons Range Report II*, September 1995, 35.

1907 (that is, the lands set apart as a reserve at Aupe IR 6 were insufficient and inadequate).

- Additional acreage was required to sustain and facilitate the natural growth and development of the Homalco community at Aupe IR 6.
- The lands adjacent to Aupe IR 6 included existing Indian settlements of the Band. In particular, additional acreage was required to protect the Band's grave sites and gardens which had existed on those lands for at least 15 or 16 years.
- The requested lands were lands which the Homalco had used and occupied long before the advent of any non-Indians in the area of Bute Inlet.

It is true that Aupe IR 6 was rocky and unsuitable for cultivation. As the Band points out, Commissioner O'Reilly recognized its limited value when he visited Aupe in 1888. However, Commissioner O'Reilly allotted five other reserves in addition to Aupe 6. At least one of these reserves, Homalco IR 1, was suitable for cultivation.[145] No explanation was given to us as to why the Band could not use one or more of its other reserves for agricultural purposes or for the growth and development of its community. We do know that Indian Agent McDonald advised the Band to surrender 80 acres from one of its other reserves in exchange for the land sought. We also know that the Band refused to follow the Indian Agent's advice.[146] However, no information was provided explaining the basis of the Band's decision. This is not to say that the Band did not have a valid reason for its position that it needed more land in addition to its six reserves. For example, it may be that all the available agricultural land on all its reserves was being used. However, we did not hear any argument that the *total* lands set apart for the Band were insufficient and inadequate to meet the needs of the Band in 1907.

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[145] P. O'Reilly to Superintendent General of Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 (ICC Documents, pp. 34-41).

[146] Indian Agent to A.W. Vowell, November 16, 1907, NA, RG 10, vol. 1467, mfm C-14272 (ICC Documents, p. 65).

With respect to the Band's argument that additional acreage was required to protect the Band's grave sites and gardens, we note that, in 1907, an addition to Aupe 6 was not strictly necessary to protect the settlement lands of the Band and to ensure the Band's continued use of those lands. Before Mr. Thompson arrived, there was no threat of encroaching settlers,[147] and it appears that the Band was free to use the land for its graveyards, gardens, and other improvements. Therefore, given the circumstances in 1907 when the Band made its request, we do not find that Canada had a fiduciary obligation *at that time* to acquire and set apart additional reserve lands for the Band.

We appreciate the Band's position that the lands adjacent to Aupe IR 6 were lands to which they had a special, long-standing attachment. However, we are restricted in our ability to consider arguments based on traditional use and occupation. If a claim arises solely from unextinguished aboriginal rights or title, the matter is characterized as a "comprehensive claim" rather than as a "specific claim" and it falls outside the scope of the Specific Claims Policy.

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[147] In 1908 Indian Agent McDonald wrote that there were "no white settlers within twenty miles of the village" (R.C. McDonald to J.D. McLean, Secretary, Department of Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] [ICC Documents, p. 72]).

Interpretation of Article 13 of *Terms of Union, 1871*

Finally, we turn to the third ground raised by the Band for Canada's obligation to acquire additional reserve lands: Article 13 of the *Terms of Union, 1871*. When British Columbia joined Canada in 1871, Article 13 of the *Terms of Union* provided as follows:

> 13. The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.
>
> To carry out such policy, tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies.[148]

The difficulty with relying upon Article 13 is that it contains ambiguous language. In particular, it states that Canada is to continue "a policy as liberal as that hitherto pursued by the British Columbia Government" and the Local Government is to convey "tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose." Thus, as a first step, we must examine the "policy" of the British Columbia government and the extent of land that it was its "practice" to appropriate.

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[148] RSC 1985, App. II, No. 10, in Jack Woodward, *Native Law* (Scarborough: Carswell, 1994), 234-35.

We agree with the statement made by Professor Jack Woodward in his book *Native Law* that Article 13 is a difficult provision to interpret:

> In pre-Confederation British Columbia . . . it is arguable that two different policies concerning the allocation of Indian lands were operating: the generous and liberal policy of Governor Douglas, and the restrained policies of his successors. Since the British Columbia Terms of Union constitutionalized a policy "as liberal" as that pursued by the colony, it is an awkward provision to interpret.[149]

Unfortunately, other than Canada's reference to an article by Robert Exell entitled "History of Indian Land Claims in B.C.,"[150] the parties did not discuss the meaning and scope of Article 13 in their written or oral submissions.

There is support in the academic literature for the view that the policy followed by Governor James Douglas in the 1850s and early 1860s was, indeed, generous and liberal.[151] Robert Exell writes that Douglas "introduced a policy of asking the Indians to indicate the extent of the lands they required, and of setting aside these lands for them."[152] However, Professor Paul Tennant suggests that this view does not give sufficient weight to Indian complaints regarding the size of their reserves.[153] There is also continuing debate over the actual acreage formula, if any, applied by Governor Douglas.[154] He, himself, referred to allotments of 10 acres per family. Professor Tennant explains as follows:

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[149] Woodward, *Native Law*, 234.

[150] Robert Exell, "History of Indian Land Claims in B.C." (1990), 48 The Advocate 866.

[151] See, for example, Woodward, *Native Law*, 234; Robin Fisher, "Joseph Trutch and Indian Land Policy," in W.P. Ward and R.A.J. McDonald, eds., *British Columbia: Historical Readings* (Vancouver: Douglas & McIntyre, 1981), 155.

[152] Exell, "History of Indian Land Claims in B.C.," note 150 above, 867.

> In one of his last speeches as governor, as he opened the first session of the mainland legislature, Douglas summarized his Indian policy and said about reserves:
>
> The Native Indian Tribes are quiet and well disposed; the plan of forming Reserves of Land embracing the Village Sites, cultivated fields, and favourite places of resort of the several tribes, and thus securing them against the encroachment of Settlers, and for ever removing the fertile cause of agrarian disturbance, has been productive of the happiest effects on the minds of the Natives. *The areas thus partially defined and set apart, in no case exceed the proportion of ten acres for each family concerned*, and are to be held as the joint and common property of the several tribes, being intended for their exclusive use and benefit, and especially as a provision for the aged, the helpless, and the infirm.[155] [Emphasis added by Professor Tennant.]

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[153] Tennant, *Aboriginal Peoples and Politics*, note 37 above, 32.

[154] Paul Tennant, "The Historical and Legal Dimensions," in Frank Cassidy, ed., *Reaching Just Settlements* (Lantzville, BC: Oolichan and Institute for Research on Public Policy, 1991), 30.

[155] Tennant, *Aboriginal Peoples and Politics*, note 37 above, 33-34. It may be that the Homalco Band already had 10 acres per family before it made its request for an additional 80 acres of land in 1907. According to the official census (as reported by Commissioner O'Reilly) on August 10, 1888, the population of the Homalco tribe was 74 (P. O'Reilly to Superintendent General, Indian Affairs, December 8, 1888, NA, RG 10, vol. 1277, mfm C-13900 [ICC Documents, p. 39]). Assuming that all 74 people represented a family, the "ten-acre" formula would have allowed 740 acres. Canada's published "Schedule of Indian Reserves . . . for the Year Ended June 30, 1902" shows that the total acreage of the six reserves of the Homalco was 1416.50 acres (Canada, Parliament, *Sessional Papers*, 1903, No. 27a, Department of Indian Affairs, Annual Report for 1901-02, p. 38 [ICC Documents, pp. 61-62]).

Professor Tennant rationalizes the limited reserve acreage granted under Governor Douglas with the fact that he also implemented legislation allowing Indians to pre-empt land.[156] Further, Professor Tennant notes that, despite Governor Douglas's words, some reserves contained more than 10 acres per family.[157] To add to the confusion, there is evidence that Governor Douglas's words were misconstrued. In a letter written in 1874, he described his policy as follows:

> . . . in laying out Indian reserves no specific number of acres was insisted on. The principle followed in all cases, was to leave the extent & selection of the land, entirely optional with the Indians who were immediately interested in the Reserve; the surveying officers having instructions to meet their wishes in every particular & to include in each reserve the permanent Village sites, the fishing stations, & Burial grounds, cultivated land & all the favourite resorts of the Tribes, & in short to include every piece of ground to which they had acquired an equitable title through continuous occupation, tillage, or other investment of their labour. This was done with the object of securing to each community their natural or acquired rights; of removing all cause for complaint on the ground of unjust deprivation of the land indispensable for their convenience or support, & to provide against the occurrence of Agrarian disputes with the white settlers.
>
> Before my retirement from Office several of these Reserves, chiefly in the lower districts of Fraser River & Vancouver's Island, were regularly surveyed & marked out with the sanction & approval of the several communities concerned, & it was found on a comparison of acreages with population that the land reserved, in none of these cases exceeded the proportion of 10 acres per family, so moderate were the demands of the natives.
>
> It was however never intended that they should be restricted or limited to the possession of 10 acres of land, on the contrary, we were

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[156] Tennant, *Aboriginal Peoples and Politics*, note 37 above, 34-37.

[157] Ibid., 34.

> prepared, if such had been their wish to have made for their use much more extensive grants.[158]

Whatever the policy of Governor Douglas, it is clear that after his retirement in 1864, the policy of the Chief Commissioner of Lands and Works, Joseph Trutch, was not so generous. Robert Exell writes that "[o]ne of [Trutch's] first acts was to put a halt to the 'generous' reserve allocation policy of Douglas. Existing reserves were cut back and, in some cases, pre-emptions were granted to whites of lands that had originally been reserved for Indians."[159] Moreover, in 1865 a colonial ordinance made it unlawful for Indians to pre-empt land except with the permission of the Governor.[160]

One thing is evident to us from the research which we have been able to do thus far: the meaning and scope of Article 13 is controversial and open to several different interpretations. We are mindful of the statement made by Mr. Justice Dickson (as he then was) in *Jack v. The Queen* that, "if [Article 13] can be said to be ambiguous, it should be so interpreted as to assure the Indians, rather than to deny them, any liberality which the policy of the British Columbia government may have evinced prior to Union."[161] However, we note that Mr. Justice Dickson was the minority in that case. In addition, the *Jack* case was concerned with British

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[158] James Douglas to I.W. Powell, Provincial Commissioner of Indian Affairs, October 14, 1874, BCARS, F/S2/D74.

[159] Exell, "History of Indian Land Claims in B.C.," note 150 above, 869.

[160] Ibid., 868.

[161] *Jack v. The Queen*, [1979] 2 CNLR 25 at 30 (SCC).

Columbia's policy with respect to Indian fishing. Mr. Justice Dickson stated as follows:

> The next issue to be considered is whether Indian fishing can properly be regarded as within the "policy" to which reference is made in the first paragraph of auticle [sic] 13 and, if so, what content can be given to the pre-Confederation policy of the Colony. It is not correct to advert to the post-Confederation Indian policy in order to determine the content of "policy" for our purposes. In this appeal we are concerned with the application of the minimum standard of pre-Confederation policy to the federal government after Confederation. *As the appellants state in their factum - and there is much historical evidence to support them - "Given the limited and ungenerous policies of British Columbia prior to Confederation, this standard will only rarely be able to be invoked against the federal government. It may be that it cannot be invoked in any area but that of fisheries."*[162] [Emphasis added.]

This suggests that the relevant pre-Confederation *land* policy of British Columbia may *not* have been generous. Given the difficulty in construing Article 13 and the lack of decisive information available to us at this point, we cannot find that Article 13 of the *Terms of Union, 1871*, imposed a duty on Canada to provide additional land in 1907.

In sum, on the basis of the evidence and arguments presented to us, we are unable to find that Canada had a positive duty to acquire 80 additional acres of land for the Band. We emphasize again that we are speaking only of duties which fall within the ambit of the Specific Claims Policy and not of duties which may or may not arise from the existence of aboriginal rights or title and which may be pursued through other avenues of redress.

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[162] Ibid. at 33.

ISSUE 3

Did Canada have an obligation to protect the Band's settlement lands from Mr. Thompson's pre-emption claim? If so, did Canada breach that obligation?

Pre-emption of Land

The facts surrounding Mr. Thompson and his pre-emption application are very disturbing. He was clearly motivated by self-interest and had little regard for the interests of the Band. Even before he submitted his pre-emption application, the evidence shows that he was primarily concerned with obtaining advantages for himself. For example, shortly after his arrival to Aupe, Mr. Thompson used space in the school to set up a post office. He and his wife then proceeded to establish a store in the school, which, at least initially, was in violation of the *Indian Act*.[163] While the Thompsons' retail and postal activities were portrayed as a convenience to the Band, at least some members of the Band were not pleased with this use of the school.[164]

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[163] Section 42 of the *Indian Act*, RSC 1906, c. 81, provided as follows:

> **42.** No official or employee connected with the inside or outside service of the Department of Indian Affairs, and no missionary in the employ of any religious denomination, or otherwise employed in mission work among Indians, and no school teacher on an Indian reserve, shall, without the special license in writing of the Superintendent General, trade with any Indian, or sell to him directly or indirectly, any goods or supplies, cattle or other animals.
> 2. The Superintendent General may at any time revoke the license so given by him.

When the Thompsons first opened the store they did not have the required licence; see, for example, R.C. McDonald to J.D. McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 128); R.C. McDonald to J.W.L. Browne, May 14, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 130).

Apart from the Thompsons' opportunistic use of the school for the post office and store, of most direct relevance to us here is Mr. Thompson's dishonesty in relation to his pre-emption application. At the time that he submitted his application, the legislation governing pre-emptions expressly protected Indian settlements from pre-emption:

> *Pre-emption of Crown Lands.*
>
> **5.** Except as hereinafter appears, any person being the head of a family, a widow, or single man over the age of eighteen years, and being a British subject, . . . may for agricultural purposes record any tract of *unoccupied and unreserved Crown Lands (not being an Indian settlement)* not exceeding one hundred and sixty acres in extent: Provided, that such right shall only extend to lands bonâ fide taken up for agricultural purposes, and shall not be held to extend to any of the aborigines of this continent, except to such as shall have obtained permission in writing to so record by a special order of the Lieutenant-Governor in Council: Provided also, that such right shall not extend to the foreshore, tidal lands, the bed of the sea, or lands covered by any navigable water.[165] [Emphasis added.]

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[164] See, for example, McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); McDonald to J.W.L. Browne, May 14, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 130); Chief George Harry, Transcript, February 23, 1915, Royal Commission on Indian Affairs for the Province of British Columbia, Proceedings, pp. 312-13 (ICC Documents, pp. 322-23).

[165] *Land Act*, SBC 1908, c. 30, s. 5.

In his oral submissions, Mr. Becker assisted us in understanding the meaning of the term "settlement":

> MR. BECKER: The term "settlement lands" is in fact a term that was used in provincial legislation to deal with lands that were being used by Indians, and the term is not defined in the provincial legislation, but the idea was that no one can pre-empt lands that are settlement lands. There should not be any Indian settlement lands within a pre-emption.
>
> [. . .]
>
> THE CHAIRPERSON: Just to conclude this part of the discussion then, explain to me when you talk about settlement lands what you thought was intended to be in fact settlement lands. . . .
>
> MR. BECKER: Our position in terms of the meaning of "settlement lands" are those lands that are actively being used by the band either as areas of cultivation, graveyards, areas where they are residing, basically areas of active use by the band that probably would not extend to areas where they would go to hunt or to trap in terms of – that would encompass a much wider area. We're talking about areas that they were settled on and actively using.[166]

Canada does not dispute that there were Indian settlement lands contained within the 160-acre area Mr. Thompson sought to pre-empt. At the very least the Band's school and grave sites were contained within that area.[167]

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[166] ICC Transcript, June 9, 1995, pp. 77 and 84.

[167] Mr. Becker stated as much in his oral submissions (ICC Transcript, June 9, 1995, p. 77).

As part of the application process, the applicant was required to enclose a full description of the land and a sketch plan. The applicant was also required to make a declaration before a justice of the peace, notary public, or commissioner.[168] Mr. Thompson made such a declaration and in it he solemnly declared, among other things, that he was applying for "a pre-emption record of One hundred and Sixty acres of unoccupied and unreserved Crown lands (not being part of an Indian Settlement) . . . ." His accompanying sketch plan did not identify any Indian settlements, grave sites, or improvements.[169]

Mr. Thompson's declaration was clearly false and misleading. As mentioned above, the Band's school and grave sites were on the lands. In other words, the lands were *not* "unoccupied" and they *were* "part of an Indian Settlement." There is evidence that Mr. Thompson was fully aware of the Band's use and occupation when he made his declaration. For example, in December 1910, the Assistant Deputy and Secretary of the Department of Indian Affairs notified the Deputy Commissioner of the Lands Department that "the pre-emption obtained by Mr. William Thompson has been granted by your Department evidently without knowledge of the fact that an expensive school-house had been built on the land and that a large Indian grave-yard was also situated on it, *although Mr. Thompson appears to have ascertained their positions before making his application*" (emphasis added).[170] Indeed, Mr. Thompson used his living arrangement in the Homalco school to satisfy his occupancy requirements for the pre-emption.[171]

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[168] *Land Act*, SBC 1908, c. 30, s. 7(2).

[169] Thompson, Application for Pre-emption Record, February 21, 1920, BC, Lands, Roll 2236 (ICC Documents, pp. 114-16).

When he was later questioned about his declaration, Thompson gave the feeble excuse that he did not knowingly make any false statements:

> the way I understand it, is, that I have taken up no land belonging to the Indians. I put my post alongside of the Indian Reserve post marked I.R. 1888 which was shown me by an Indian he also showed me the line of the Indian Reserve. In regards to the School House and grave yard (proper) I did not intend to interfere with that, but to let that matter for the Government to settle, after the land had been surveyed. . . . The fact of the Schoolhouse and graveyard being part of an Indian Settlement I did not look at it in that light.[172]

The fact that Thompson may not have regarded the school and graveyard as part of an "Indian settlement" does not explain his declaration that the land was unoccupied. Nor does it explain why none of these improvements were shown on the sketch map. In addition, his explanation rings hollow considering the extent of the Band's improvements when the pre-emption application was made.[173]

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[170] McLean to Renwick, December 1, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 142).

[171] A.S. Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 136).

[172] Thompson to Deputy Minister, May 25, 1911, BC, Lands, Roll 2236 (ICC Documents, p. 163).

[173] When the Inspector of BC Indian Schools visited the Band in November 1910, he found that "[t]he land where the school is built, the grave yard site, and just a few acres around have been partly cleared by the Indians, the trees cut down, and grass growing. Their few cattle graze here. These are all included in Mr. Thompson's pre-emption claim." A.S.

As if that was not enough, it became evident later that Mr. Thompson made a false declaration in relation to another aspect of his pre-emption application. The provincial pre-emption legislation explicitly specified that the land had to taken up for *agricultural purposes*:

> **31.** No pre-emption record shall be granted except for land taken up for agricultural purposes, and the Chief Commissioner may cancel any such record when it shall be shown to his satisfaction that the same has been obtained for other than agricultural purposes. Timber lands, as specified in sub-section (5) of section 34 of this Act, shall not be open for pre-emption.[174]

In Thompson's application for a pre-emption record, he solemnly declared that the land was "not timber land within the meaning of the Act" and that his application was "for settlement and occupation, for agricultural purposes."[175] However, he subsequently told the Inspector of Indian Agencies that "it was a timber claim he had and not agricultural land."[176] It then came to light in October 1923 that the land carried timber "considerably in excess of the statutory limit."[177]

Green, Inspector of BC Indian Schools, to J.D. McLean, Secretary, Department of Indian Affairs, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, p. 136).

[174] *Land Act*, SBC 1908, c. 30, s. 31. "Timber lands" were described in s. 34(5) as "lands which contain milling timber to the average extent of eight thousand feet to the acre west of the Cascades, and five thousand feet per acre east of the Cascades, to each one hundred and sixty acres."

[175] Thompson, Application for Pre-emption Record, February 21, 1920, BC, Lands, Roll 2236 (ICC Documents, pp. 114-16).

[176] Ditchburn, Inspector of Indian Agencies, to Renwick, Deputy Minister of Lands, August 1, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 236).

[177] Memos, BC, Lands, October 8, 1923 (ICC Documents, p. 483).

Specific Claims Policy and Fraud

In our view, Mr. Thompson's actions with respect to his pre-emption application constitute fraud. The criteria for proving fraud were described by Viscount Haldane L.C. in *Nocton v. Lord Ashburton*:

> Fraud must be proved by shewing that the false representation had been made knowingly or without belief in its truth, or recklessly without caring whether it was true or false. Mere carelessness or absence of reasonable ground for believing the statement to be true might be evidence of fraud, but the inference could be displaced by shewing that it was made under an honest impression that it was true.[178]

Given the considerable use the Band was making of the lands within Mr. Thompson's pre-emption claim, it seems reasonable to conclude that he either knowingly made a false representation that the lands were unoccupied and not an Indian settlement, or he made the representation recklessly without caring whether it was true or false. The same holds true for his declaration that the lands were not timber lands.

Under the Specific Claims Policy, Canada is prepared to acknowledge claims which are based on "[f]raud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated."[179] We find that Mr. Thompson was an employee of the federal government[180] and that his fraudulent misrepresentation was in connection with the acquisition of Indian land.

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[178] *Nocton v. Lord Ashburton*, [1914] AC 932 at 947 (HL). See also, *Canadian Encyclopedic Digest (Western)*, 3d ed. (Toronto: Carswell, 1995), vol. 15, Title 67, "Fraud and Misrepresentation," § 1.

[179] *Outstanding Business*, 20.

It is true as Canada has argued that the land was Indian "settlement" land not Indian "reserve" land as set out in the Policy. However, despite this distinction, in our opinion the Band's claim comes within the scope of the Specific Claims Policy. As mentioned in Part II of this report, we do not view the list of examples enumerated under the policy as exhaustive. In addition, we perceive the underlying purpose of the policy to be the settlement of legitimate, long-standing grievances. To deny a claim simply because the fraud of an employee is connected to "settlement" lands rather than "reserve" lands is hair-splitting and completely counter to the purpose of the policy. The Supreme Court of Canada has found that treaties should be given a fair and liberal construction in favour of the Indians and treaties should be construed not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.[181] We are of the opinion that the policy should be interpreted in the same fashion.

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[180] The Band throughout its written argument consistently refers to Thompson as an "employee of Indian Affairs." See, for example, Response to Canada's Submission of March 31, 1995 by the Homalco Indian Band, part V, para. 10 (b). At no point in its written or oral argument did Canada challenge this assertion. We find that there is sufficient documentary evidence to support a finding that Thompson was an employee of Indian Affairs between 1908 and 1912. For instance, in January 1908, the Indian Agent recommended "to the favorable consideration of the Department" the suggestion of Father Chirouse that Thompson and his wife be hired (R.C. McDonald to J.D. McLean, Secretary, Department of Indian Affairs, January 20, 1908, NA, RG 10, vol. 1467, mfm C-1427[2] [ICC Documents, pp. 70-72]). In a subsequent letter dated June 9, 1908, the Indian Agent informed the Indian Superintendent that "Mr. William Thompson has been engaged, *subject to the approval of the Department*, to take charge of the [Homalco Indian Day School] for a year at a salary of $600 . . ." [emphasis added] (R.C. McDonald to A.W. Vowell, Indian Superintendent, BC, June 9, 1908, NA, RG 10, vol, 1468, mfm C-14272 [ICC Documents, p. 81]). Finally, in February 1915, Mr. Thompson stated that he worked with and was discharged from the "Indian Department": "Now I have been twenty-five years with the Indian Department as a schoolteacher - I opened the first school here, and took up this pre-emption in consequence of which I was discharged from the Indian Department . . ." (Mr. Thompson, Transcript, February 23, 1915, Royal Commission, Proceedings, p. 323 [ICC Document, p. 332]).

On the basis set out above, we find that Thompson's activities with respect to the pre-emption consititute fraud within the meaning of the policy and are the proper basis for a specific claim. We will discuss the loss to the Band flowing from Mr. Thompson's pre-emption claim later in this report.

Canada's Fiduciary Obligation

In the alternative, we will now consider the argument raised by the Band that Canada breached its fiduciary obligation to the Band in relation to Mr. Thompson's pre-emption claim. As in Issue 2 above, the Band appears to base Canada's fiduciary obligation on the special historical relationship between the aboriginal peoples of Canada and the Crown. Distilied down to its basics, the Band's argument as we understand it is that Canada breached its fiduciary obligation to the Band by failing or neglecting to protect the Homalco Indian settlement lands, and by failing or neglecting to prevent the Thompsons from:

- using the school to operate a post office and a store without a licence from the Superintendent General as required by the *Indian Act*;
- using the school to satisfy their residency requirements under the provincial pre-emption legislation;
- falsely portraying the Homalco's tribal lands and Indian settlements as being confined to the school and two grave sites;

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[181] See *Nowegijick v. The Queen*, [1983] 2 CNLR 89 (SCC) at 94, as followed in *Simon v. The Queen* [1986] CNLR 153 (SCC) at 167.

- pre-empting the Homalco Indian settlement lands, given that Mr. Thompson was in fundamental breach of express provisions of the provincial pre-emption legislation; Mr. Thompson continuously lied, misled, or misrepresented the facts to the Department of Indian Affairs and the province; he was an employee of the Department of Indian Affairs; and he was in a unique position of trust in relation to the Band as the teacher of the Homalco children.

The Band suggests in its written submissions that Canada should have taken steps to cancel Thompson's pre-emption claim.[182] This argument is problematic because, as Mr. Becker pointed out in his oral submissions, it is unclear whether Canada had any power to cancel the pre-emption, since pre-emptions involved provincial lands and provincial legislation.[183] However, it became clear after Mr. Kelliher's oral submissions that the Band's position is that Canada should have commenced legal proceedings against Thompson or removed him from the school, thereby undermining his pre-emption application.[184]

Canada argues that there was no obligation on Canada to protect the Band's settlement lands, being those portions of the lands upon which the school and graveyards were located. It submits that there was no agreement or general undertaking to protect lands that might be subject to an Indian interest, nor was there a general duty to protect traditional lands from the actions of others. Canada adds that it had no jurisdiction or authority to deal with the lands in question as they were owned by and were under the control and administration of British Columbia. Therefore, Canada did not possess the "power" or "discretion" to prevent the province from allowing pre-emptions of portions of the lands. In the alternative, Canada maintains that, if it did owe a fiduciary duty to protect the Band's settlement lands, it discharged its duty. Not only did Canada advise the province that the pre-emption included settlement lands and request that such lands be eliminated from the pre-emption, but it also successfully had the settlement lands eliminated from the pre-emption and added to the Band's reserve.

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[182] Brief of the Homalco Indian Band, March 31, 1995, pp. 8, 11, 13, and tab F, p. 3; Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, June 6, 1995, p. 2.

[183] ICC Transcript, June 9, 1995, p. 86.

[184] Ibid., 102.

Unlike the circumstances in 1907, the settlement lands of the Band were threatened by an encroaching settler, namely William Thompson, and Thompson did interfere with the Band's use of the lands.[185] Therefore, to begin this analysis, it is necessary to examine whether the specific circumstances of the relationship between Canada and the Band gave rise to a fiduciary obligation to protect the settlement lands of the Band after Mr. Thompson submitted his pre-emption claim.

In coming to the conclusion that Canada did not have such a fiduciary obligation, Canada uses the following test:

> A fiduciary obligation may exist where three elements are present:
>
> 1. an undertaking or agreement to act for, on behalf of, or in the interests of another person;

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[185] For example, as early as March 1910, a member of the Band complained to the Indian Agent that Thompson had informed them that he "had purchased the land adjoining their reserve, and that, in future, when they wish to bury anybody in their grave-yard, they would have to pay [Thompson] $5.00 for each grave; also that [Thompson] would not allow them to cut any fire-wood for the school on the land adjoining the reserve" (McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 [ICC Documents, p. 118]).

> 2. power or discretion can be exercised unilaterally to affect that person's legal or practical interests; and
>
> 3. reliance or dependence by that person on the undertaking or agreement, and vulnerability to the exercise of power or discretion.[186]

Canada cites the cases of *Guerin v. The Queen*[187] and *Frame v. Smith*[188] in support of its test.

Undertaking or Agreement

With respect to the first element listed above, Canada submits that, in circumstances such as these where reserve lands are not involved, a duty to act in the interests of a band may arise "where the Crown has . . . assumed a duty of a fiduciary character by agreement or express undertaking."[189] In our view, Canada has taken too narrow a view of the law in asserting that an "agreement or *express* undertaking" must be shown for a fiduciary obligation to arise. We assume that Canada derived the first element of its test from the *Guerin* case where Mr. Justice Dickson (as he then was) said:

> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit

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[186] Submissions on Behalf of the Government of Canada, March 31, 1995, p. 10.

[187] *Guerin v. The Queen* (1984), 13 DLR (4th) 321 (SCC).

[188] *Frame v. Smith* (1987), 42 DLR (4th) 81 (SCC).

[189] Submissions on Behalf of the Government of Canada, March 31, 1995, pp. 11, 14.

> of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[190]

However, Mr. Justice Dickson did not say that an undertaking must be "express." Nor did Madam Justice Wilson refer to an "express" undertaking in *Frame v. Smith*. In that case, she provided the following guidelines:

> there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.[191]

In a still later case, Mr. Justice La Forest, after referring to Mr. Justice Dickson's comments in the *Guerin* case, said that he "would go one step further, and suggest that fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary."[192]

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[190] *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 341 (SCC).

[191] *Frame v. Smith* (1987), 42 DLR (4th) 81 at 98-99 (SCC). Madam Justice Wilson's approach was approved in *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 DLR (4th) 14 (SCC) by La Forest J. at 29, and by Sopinka J. at 62-63, and in *Hodgkinson v. Simms* (1994), 97 BCLR (2d) 1 (SCC) by La Forest J. at 21-22, and by Sopinka and McLachlin JJ. at 60.

Even if a unilateral undertaking to protect Indian settlement lands is required, we are of the view that such an undertaking existed as is reflected, at least by May 19, 1911, in section 37A of the *Indian Act*. Section 37A was amended on May 19, 1911, to read as follows:

> **37A**. If the possession of any lands reserved or claimed to be reserved for the Indians, *or of any lands of which the Indians or any Indian or any band or tribe of Indians claim the possession or any right of possession,* is withheld, or if any such lands are adversely occupied or claimed by any person, or if any trespass is committed thereon, the possession may be recovered for the Indians *or Indian or band or tribe of Indians*, or the conflicting claims may be adjudged and determined or damages may be recovered in an action at the suit of His Majesty on behalf of the Indians *or Indian* or of the band or tribe of Indians *entitled to or* claiming *the* possession *or right of possession* or entitled to *or claiming* the declaration, relief or damages.
>
> 2. The Exchequer Court of Canada shall have jurisdiction to hear and determine any such action.
>
> 3. Any such action may be instituted by information of the Attorney General of Canada upon the instructions of the Superintendent General of Indian Affairs.
>
> 4. Nothing in this section shall impair, abridge or in anywise affect any existing remedy or mode of procedure provided for cases, or any of them, to which the section applies.[193] [Italics added.]

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[192] *M. (K.) v. M. (H.)* (1992), 14 CCLT (2d) 1 at 40-41 (SCC).

[193] *Indian Act*, RSC 1906, c. 81, as am. by SC 1910, c. 28, s. 1, SC 1911, c. 14, s. 4.

The italicized words were not contained in the previous version of section 37A(1). The House of Commons *Debates* reveal that the amendment was intended to protect lands which were occupied by Indians but which were not reserves:

> Mr. OLIVER. This Bill [(No. 177) to amend the Indian Act] is made up of four sections each independent of the other and each intended to meet a condition now existing in connection with the administration of Indian Affairs. . . . Several provisions are considered desirable owing to the changed conditions resultant from pressure of population. . .
>
> [. . .]
>
> On section 4, subsection 5,
>
> Mr. DOHERTY. What is the change effected in the law by this section?
>
> Mr. OLIVER. This is a substitution for 37a which was the principal amendment of the Act of last session. Possession is nine points of the law, and it was found that previous to the passing of this provision there was serious difficulty in removing trespassers from Indian lands. This legislation made it possible to facilitate the removal of settlers from lands that were held as Indian reserves. We have found, however, that Indians in occupation of lands that are not specially reserved have not the protection it is desirable they should have. In the Yukon there are no reserves, and the efforts of the missionaries and others are directed to getting the Indians to enter on the permanent occupation of the land, and we think it is right they should have that protection which this amendment proposes to give them.
>
> Mr. DOHERTY. I understand the minister to say that this extends to land which the Indians claim.

Mr. OLIVER. Exactly.[194]

We do not see Mr. Oliver's reference to the Yukon as limiting the geographical scope of Canada's undertaking; the actual words of the amendment are much more broad and general. In this case, the conditions specified in section 37A(1) were met: the "lands of which [the Band] claim[ed] the possession or [a] right of possession" (that is, the Band's settlement lands) were adversely occupied or claimed by Mr. Thompson. Section 37A implies an undertaking on the part of Canada to protect such lands.

Unilateral Discretion

However, did Canada have a power or discretion which could be exercised unilaterally to affect the Band's interests? In our opinion it did. We disagree with Canada's position that, since the lands in question were owned by British Columbia, Canada had no "power" or "discretion" to exercise in this matter. We agree that Canada did not have the power or discretion to cancel Mr. Thompson's pre-emption outright; that power belonged to British Columbia. However, that does not mean that Canada was immediately free of any fiduciary obligation. In the *Guerin* case, Mr. Justice Dickson stated that limitations on a fiduciary's discretion do not eliminate a fiduciary obligation:

> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditional categories of

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[194] Canada, House of Commons, *Debates* (April 26, 1911), 7825, 7867.

> fiduciary. . . . A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.[195]

Thus, the fact that Canada did not have complete power to cancel Mr. Thompson's pre-emption does not mean that it did not have *any* discretion or power which could give rise to a fiduciary obligation. As we see it, Canada did have a discretion to make representations to the province on the Band's behalf, to request that the Band's settlement lands be eliminated from the pre-emption claim, and to request that the settlement lands be made into reserve land. Coupled with this, Canada had a discretion to take action against Mr. Thompson directly. Thompson was an employee of the Department of Indian Affairs (that is, Canada). As his employer, Canada had the power to fire him. The Band's interests were affected by the exercise of this power because Mr. Thompson's use of the Band's school was dependent upon his continued employment as teacher. As will be discussed more fully below, Mr. Thompson's ability to live in the school had important implications for his pre-emption claim.

Vulnerability

Finally, with respect to the third element identified by Canada for the existence of a fiduciary obligation, in our opinion the Band was vulnerable to the exercise of Canada's discretion. Under the provincial *Land Act* in force at the time, it was virtually impossible for the Band to pre-empt or purchase land.[196] Accordingly, the Band, itself, was powerless to prevent the encroachment of white settlers on its settlement lands. The Band was also vulnerable to the decisions that Canada made with respect to Mr. Thompson. In her book, *Languages and Their Roles in Educating Native Children*, Barbara Burnaby writes that, from the middle or late 19th century until after the Second World War, "[n]ative parents had no voice in decision making in [native] schools."[197] Although she is speaking of the historical situation in Ontario, it appears that the same comment could be made about the Band's situation in the early 1900s. The documents are riddled with complaints from the Band about Mr. Thompson's work and his pre-emption application.[198] Considering the level of the Band's discontent, one can only assume that the Band members were powerless to fire Thompson by themselves. In essence, Canada assumed an intermediary role in the hiring and firing of the Band's teacher. By interposing itself between the Band and Mr. Thompson, Canada, in our view, assumed an obligation to act in the Band's best interests in its dealings with Thompson.

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[195] *Guerin v. The Queen* (1984), 13 DLR (4th) 321 at 343 (SCC).

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[196] "Aborigines" could only pre-empt or purchase land with the permission of the Lieutenant Governor in Council (*Land Act*, SBC 1908, c. 30, ss. 5 and 34(14)).

[197] Barbara Burnaby, *Languages and Their Roles in Educating Native Children*, Informal Series 16 (Ontario: Ontario Institute for Studies in Education Press, 1980), 39.

[198] See, for example, McDonald to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118); McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); McDonald to Secretary, Department of Indian Affairs, January 31, 1911, NA, RG 10, vol. 14274, mfm C-14274 (ICC Documents, pp. 149-50); Indian Agent to Secretary, Department of Indian Affairs, October 24, 1911, NA, RG 10, vol. 1475 (ICC Documents, p. 172); Indian Agent to Green, November 25, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, p. 175); Indian Agent to Secretary, Department of Indian Affairs, December 12, 1911, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 180-82); Indian Agent to Secretary, Department of Indian Affairs, January 8, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 185-86); Indian Agent to Ditchburn, January 12, 1912, NA, RG 10, vol. 1475, mfm C-14275 (ICC Documents, pp. 190-92).

Taking into account all the above circumstances, we find that Canada was subject to a fiduciary obligation.

Breach of Fiduciary Obligation

The next question is whether Canada breached this obligation. We are satisfied that Canada acted reasonably and responsibly in its dealings with the province; it was diligent and persistent in its attempts to have the school and graveyards eliminated from Mr. Thompson's pre-emption claim and, in the end, it was successful in its efforts. However, we find Canada's inaction with respect to Mr. Thompson puzzling. He himself said that he was ultimately discharged because of his pre-emption claim.[199] We cannot help but wonder why this was not done sooner. The correspondence shows that, by the end of November 1910, officials from the Department of Indian Affairs were aware of the following:[200]

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[199] Mr. Thompson, Transcript, February 23, 1915, Royal Commission, Proceedings, p. 323 (ICC Document, p. 332). Thompson's position as teacher of the Band ended March 31, 1912 (Indian Agent to Ditchburn, February 6, 1912, NA, RG 10, vol. 1475, mfm C-14275 [ICC Documents, p. 198]).

[200] Indian Agent to Thompson, March 2, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, p. 118); McDonald to McLean, April 9, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 122-23); McDonald to McLean, April 25, 1910, NA, RG 10, vol. 1472, mfm C-14274 (ICC Documents, pp. 126-28); Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-37); McDonald to Secretary, Department of Indian Affairs, November 30, 1910, NA, RG 10, vol. 1473, mfm C-14274 (ICC Documents, pp. 140-41).

- William Thompson had applied to pre-empt land adjoining Aupe IR 6.
- In the fall of 1907, the Band had asked to have some of the same land set apart as a reserve.
- The Band's school, graveyard, and other improvements were located on the land.
- Mr. Thompson knew the school and graveyard were included in his pre-emption claim, but failed to provide this information in his pre-emption application.
- The Band had previously believed that the school was located within the boundaries of the Aupe Reserve.
- Mr. Thompson intended to fulfil his pre-emption duties by living in the Band's school.
- The Thompsons were (or had been) operating a store in the school without a licence from the Superintendent General.
- Members of the Band had complained to the Department that Mr. Thompson had been neglecting his work.

It seems to us that the totality of these factors provided Canada with sufficient cause to dismiss Mr. Thompson. In our view, Canada's tardy action in this regard amounted to a breach of its fiduciary duty to the Band.

Loss to the Band

Regardless of whether this claim is based in fraud or breach of fiduciary, the identifiable loss to the Band is the same. If Canada had removed Mr. Thompson promptly after it became aware of the factors listed above, his pre-emption claim would have been jeopardized. On November 19, 1910, the Inspector of BC Indian Schools, wrote to the Secretary of the Department of Indian Affairs that, "[b]y living in the school building [Mr. Thompson] intends to fulfil his pre-emption duties, which require him to live on the land six months in each year for three years, before getting the Crown grant."[201] Although the exact date of Mr. Thompson's arrival at Aupe is unclear, it appears to have been around July 17, 1908.[202] Applying the three-year criteria to this date, Mr. Thompson was required to live on the land six months in each year until approximately July 17, 1911. This means that, if Canada had fired Mr. Thompson immediately, he would have been forced to leave the school before the completion of his residency requirements. We acknowledge that, by November 1910, Mr. Thompson had built a small house "[a]bout two or three hundred yards straight down from the graveyard near the beach."[203] Therefore, at least theoretically, Mr. Thompson could have moved into his house and qualified for a Crown grant in any event. It is questionable, however, whether he was willing or able to fulfil his residency requirements other than by living in the school. In March 1912, when the termination of his employment was imminent, the Indian Agent wrote to Mr. Thompson informing him that he had "nearly a month in which to provide a dwelling on your own place to move into."[204] This warning suggests that Mr. Thompson's house may not have been readily available for long-term occupation. Mr. Thompson's reply to the Indian Agent's letter adds to the uncertainty:

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[201] Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 136). In their oral submissions, counsel for both parties also referred to a three-year timeframe (ICC Transcript, June 9, 1995, pp. 78, 100). We have been unable to find the statutory source for this three-year occupancy requirement.

[202] McDonald to Rev. Father Chirouse, June 9, 1908, NA, RG 10, vol. 1468, mfm C-14272 (ICC Documents, p. 80).

[203] Green to McLean, November 19, 1910, BC, Lands, Roll 2236 (ICC Documents, pp. 135-36).

> I am in receipt of a letter from Mr. Thompson, teacher of the Indian day school, Aupe reserve (Church House, B.C.), stating that while he is prepared to vacate the school as teacher on the 1st of April next, he cannot see how it is possible for him to leave the building as he has no other place to go as the recent survey takes in the house which he had erected on his pre-emption, and further stating that the recent survey does not deprive him of his right to live in the school-house which is not, as you know, located on the old Indian reserve.[205]

Mr. Thompson's great reluctance to move out of the school leaves the impression that he might not have completed his pre-emption duties if he had been fired at an earlier stage.

In short, we find that, if Canada had fulfilled its obligation to the Band and responded quickly in dismissing Mr. Thompson, in all likelihood his pre-emption would have been thwarted. However, considering that the Band's graveyards and school were ultimately eliminated from the pre-emption, we ask the question, would the Band have been in any different position today if the Thompsons had not been able to pre-empt the land? The Band's position is that it would and, as part of its submissions, it suggests that, if Canada had fulfilled its obligations to the Band, it would have acquired: "40 acres per representations by the Province in 1911"; "30 acres per Rhodes' survey in 1912"; "or 29.7 acres in 1915 per Interim Report No. 84 of the Royal Commission."[206]

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[204] Indian Agent to Thompson, March 14, 1912, NA, RG 10, vol. 1476, mfm C-14275 (ICC Documents, p. 210).

[205] Indian Agent to Ditchburn, March 21, 1912, NA, RG 10, vol. 1476, mfm C-14275 (ICC Documents, p. 211).

If Mr. Thompson's pre-emption had been stopped, it seems doubtful to us that Canada would have been able to secure 40 additional acres of land. On May 17, 1911, the Deputy Minister of Lands wrote to Chief George Harry stating that the lands occupied by the school and Indian cemeteries would be excepted from Mr. Thompson's pre-emption if the Department of Indian Affairs surveyed the lands and submitted satisfactory field notes to the province. He enclosed a tracing which depicted a 40-acre parcel of land. However, he was careful to state that the tracing provided a *suggestion* as to the lands which might be excepted from the pre-emption, and he emphasized the importance of a survey:

> Upon the tracing has been suggested the manner in which the school house and cemeteries might be excepted from the Pre-emption Record, but in the absence of survey it is impossible to say whether the exception as indicated upon the tracing would accomplish your purpose in securing the lands on which the school house stands as well as the cemeteries.
>
> This can only be done by survey, and upon survey, as before advised, steps will be taken to see that no alienation of the said lands is made by this Department.[207]

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[206] Brief of the Homalco Indian Band, March 31, 1995, p. 14. See also, Response to Canada's Submission of March 31, 1995, by the Homalco Indian Band, June 6, 1995, pp. 13-14.

[207] Deputy Minister of Lands to George Harry, May 17, 1911, BC, Lands, Roll 2236 (ICC Documents, pp. 159-61).

That same day, the Deputy Minister of Lands wrote to the Secretary of the Department of Indian Affairs advising him to conduct a survey and clarifying that, "the Minister cannot recognize [the Indians'] claim to any more lands than is actually covered by the site of the school house and the grave yard."[208] Thus, while the tracing sent to Chief Harry suggested the possibility of a 40-acre parcel of land, it appears that the province was only prepared to except from the pre-emption the lands occupied by the school and the graveyard.

However, following the completion of Mr. Rhodes's survey in 1912, the province expressed its intention to remove a parcel of land measuring 30 by 10 chains from Mr. Thompson's pre-emption.[209] This parcel of land, later designated as Lot 430, Range 1, consisted of 29.7 acres.[210] The Royal Commission subsequently recommended that this same quantity of land be constituted a reserve for the use and purposes of the Band.[211]

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[208] Renwick to Secretary, Department of Indian Affairs, May 17, 1911, DIAND, Region E 5673-552 (ICC Documents, p. 162).

[209] Deputy Minister of Lands to J.A.J. McKenna, August 21, 1912, DIAND, Region E 5673-552 (ICC Documents, p. 241); Deputy Minister of Lands to Surveyor General, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 242); Deputy Minister of Lands to William Thompson, August 21, 1912, BC, Lands, Roll 2236 (ICC Documents, p. 243); Ditchburn to Byrne, August 31, 1912, NA, RG 10, vol. 1313, mfm C-13908 (ICC Documents, pp. 246-47); Deputy Minister of Lands to William Thompson, February 20, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 301); Deputy Minister of Lands to Mrs. William Thompson, June 13, 1917, BC, Lands, Roll 2236 (ICC Documents, p. 388).

[210] Surveyor General to Deputy Minister of Lands, January 22, 1914, BC, Lands, Roll 2236 (ICC Documents, p. 288); Renwick to J.G.H. Bergeron, April 21, 1914, NA, RG 10, vol. 11020, file 520B, mfm T-3957 (ICC Documents, p. 307).

[211] Royal Commission, Report, August 12, 1915, DIAND, Region E5673-552 (ICC Documents, p. 339).

Unfortunately, Mrs. Thompson continued to complain that the reduction in her pre-emption claim would deprive her of the site of her dwelling house and the best water frontage.[212] Considering the province's earlier willingness to eliminate 29.7 acres from the pre-emption, it seems reasonable to conclude that the final settlement of 20.08 acres for Aupe IR 6A was a direct result of the Thompsons' unending interference. Thus, in our opinion, if it were not for the Thompsons' pre-emption claim, the Band would have received 29.7 acres as recommended by the Royal Commission. Given that it received 20.08 acres in 1924, then the loss to the Band is 9.62 acres.

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[212] Deputy Minister of Lands to Chief Forester, June 20, 1917, BC, Lands, Roll 2236 (ICC Documents, pp. 389-90).

PART VI

FINDINGS AND RECOMMENDATION

Under the mandate of this Commission, we can make or withhold a recommendation that a claim referred to us should be accepted for negotiation pursuant to the Specific Claims Policy. Having full regard to that policy, and having found that this claim discloses

- in Issue 1, a breach of an obligation arising out of the Order in Council appointing Commissioner O'Reilly;
- in Issue 3, fraud by an employee of the Department of Indian Affairs;
- in the alternative in Issue 3, a breach of Canada's fiduciary obligation to the Band;

and, having found that as a result the loss to the Band is 9.62 acres, we therefore recommend to the parties:

> **That the claim of the Homalco Indian Band with respect to Aupe IR 6 and Aupe IR 6A be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION

Daniel J. Bellegarde
Commission Co-Chair

Carole T. Corcoran
Commissioner

Aurélien Gill
Commissioner

APPENDIX A

THE HOMALCO INDIAN BAND INQUIRY

1 Decision to conduct inquiry July 5, 1994

2 Notices sent to parties July 6, 1994

3 Planning conferences September 29, 1994
December 9, 1994
February 24, 1995

4 Viewing April 18, 1995

The Commissioners visited the Aupe Indian Reserves to view the site.

5 Legal Argument June 9, 1995

Legal arguments were heard in Vancouver.

6 Content of the formal record

The formal record for this inquiry is comprised of the following:

- Documentary record (3 volumes of documents and annotated index plus an addendum: annotated index and documents)
- Exhibits
- Transcripts (1 volume of legal submissions)

The report of the Commission and letters of transmittal to the parties will complete the record for this inquiry.

APPENDIX B

STATEMENT OF ISSUES SUGGESTED BY COUNSEL FOR CANADA AND THE HOMALCO INDIAN BAND

Statement of Issues Suggested by Counsel for Canada

In its written submissions,[1] Canada proposed the following statement of issues:

1 Was there an unlawful alienation of 11 acres of land?

2 Did Canada have any obligation to provide additional reserve lands when requested by the Band?

3 Did Canada have any obligation to protect settlement lands from pre-emption and, if so, did Canada fulfil those obligations?

Statement of Issues Suggested by Counsel for the Homalco Indian Band

The Band set out its view of the issues in a number of documents submitted to Specific Claims West and this Commission. In its written "Brief,"[2] it formulated the issues as follows:

The issues pertaining to Aupe #6 are, amongst others, that:

1 Canada alienated 11 acres from Aupe #6 without the consent of the Homalco and without lawful authority;

2 Canada engaged in a course of conduct adverse to the best interests of Homalco and in breach of its lawful obligations by failing or neglecting to:

(i) restore such lands to Aupe #6; and

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[1] Submissions on Behalf of the Government of Canada, March 31, 1995, pp. 1-2.

[2] Brief of the Homalco Indian Band, March 31, 1995, pp. 10-12.

(ii) compensate Homalco for such unlawful acts or omissions.

The issues pertaining to Homalco's application for additional lands in 1907 are, amongst others, that Canada was in breach of its lawful obligations to the Homalco by failing or neglecting to take such steps as were necessary to:

1 acquire the said lands in 1907, either by agreement or outright purchase from the Province. By such acts or omissions, Canada caused the Homalco to suffer damages, in particular:

   (i) Canada interfered with Homalco's rights, interests or title to their Indian reserve and Indian Settlement lands (i.e., the Homalco's land assets);

   (ii) dispossessed the Homalco from such lands; and

   (iii) permitted those lands to be purchased by an adverse third party in whom a trust was reposed by virtue of his status as a teacher at the Homalco Indian Day School and as an employee of Indian Affairs.

2 effect the cancellation of William Thompson's pre-emption application from the outset, and, in particular, to prevent both Thompsons from:

   (i) acquiring by pre-emption a significant portion of the Homalco Indian Settlement lands applied for by Homalco in 1907, while at the same time being an employee of Indian Affairs;

   (ii) acting in a fraudulent or otherwise unlawful manner to acquire such lands, Thompson's transgressions being fully within the knowledge of Indian Affairs at all material times; and

   (iii) being unjustly enriched by their unlawful acts, the Thompsons not being *bona fide* purchasers without notice, given their unique position of trust both as teacher at the Homalco Indian Day School and as an employee of Indian Affairs.

The issues pertaining to the establishment of Aupe #6A are, amongst others, that:

1 of the 80 acres of Indian Settlement lands requested by Homalco in 1907, Canada ultimately only acquired 9.08 "new" acres. Of the 20.08 acres finally confirmed in 1923, 11 acres were those same lands unlawfully alienated from Aupe #6 by means of survey in 1888-1889.

2 at a minimum, Canada ought to have acquired 29.7 acres as Aupe #6A as set out in Interim Report No. 84 of the Royal Commission in 1915, as lands additional to the 25 acres allotted for Aupe #6.

3 Canada's acts or omissions further facilitated the acquisition of the balance of the lands by the Thompsons. Such conduct is in breach of Canada's lawful obligations to Homalco. In short, Canada permitted the Thompsons to acquire 70.92 aces of the 80 acres requested by the Homalco in 1907.

The issues pertaining to the acts or omissions of Canada subsequent to the allotment of Aupe #6A are, amongst others, that:

1 in 1975, Indian Affairs was offered the opportunity to purchase a 60-acre parcel of the lands pre-empted by Thompson for the sum of $19,000.00.

2 by failing or neglecting to acquire such lands on that occasion and at that price, Canada caused the Band to continue to suffer damages.

3 in January 1993, the lands pre-empted by the Thompsons, including the 60-acre parcel described above, were offered for purchase to the Band for the sum of $250,000. The Band accepted that offer and purchased the said lands, more particularly known as Lot 1835, Range 1, Coast District, B.C.

4 as a consequence of the foregoing, Canada has continued to follow a course of action adverse to Homalco, including:

(i) its failure or neglect to act in the best interests of the Homalco in relation to Indian Reserve and Indian Settlement lands; and
(ii) its breach of lawful obligations to the Homalco, the particulars of which are set out in [Appendix "D" of the *Brief of the Homalco Indian Band*, March 31, 1995].